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Supreme Court of the United States

No. 77-621

DADE CHRISTIAN SCHOOLS, INC.,
Petitioner,

v.

JOHNNY BROWN, JR., etc., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. 77–

DADE CHRISTIAN SCHOOLS, INC.,
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v.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Dade Christian Schools, Inc., by and through its undersigned attorneys, respectfully petitions this Court for the issuance of its Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, Case No. 75-3260.

REPORTED OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Florida (Case No. 73-1313-Civ-JE) is not reported. Appendix A.

The five (5) opinions published by the United States

Court of Appeals for the Fifth Circuit, sitting en banc, are reported at 556 F.2d 310. Appendix B.

INVOCATION OF JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit in Case No. 75-3260, affirming the judgment of the United States District Court for the Southern District of Florida, was entered July 25, 1977.

Petitioner, on August 4, 1977, filed its petition for rehearing with the Court of Appeals, which petition was denied on September 16, 1977.

Petitioner believes that 28 U.S.C. §1254(1) confers on this Court jurisdiction to review the judgment of the Court of Appeals by Writ of Certiorari.

QUESTIONS PRESENTED FOR REVIEW

QUESTION #1: DID THE DISTRICT COURT AND THE COURT OF APPEALS PLURALITY ERRONEOUSLY HOLD THAT THE BELIEFS UNDERLYING PETITIONER'S ADMISSIONS POLICY WERE NOT SUFFICIENTLY "RELIGIOUS" TO QUALIFY THE ADMISSIONS POLICY FOR PROTECTION UNDER THE FREE EXERCISE OF RELIGION CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION?

QUESTION #2: DID THE TWO CONCURRING JUDGES OF THE COURT OF APPEALS ERRONEOUSLY HOLD THAT PETITIONER'S RELIGIOUS BELIEFS WERE OUTWEIGHED BY THE RESPONDENTS' RIGHTS TO MAKE AND ENFORCE CONTRACTS AS GUARANTEED BY 42 U.S.C. §1981 AND THE THIRTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment to the United States Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Thirteenth Amendment to the United States Constitution:

> "Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> "Section 2. Congress shall have power to enforce this article by appropriate legislation."

Section 1981, Title 42, United States Code:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

STATEMENT OF THE CASE

Petitioner is a sectarian school, located on the property of and receiving subsidies from the New Testament Baptist Church, Miami, Florida. Respondents, Mr. and Mrs. Johnny Brown, Jr., and their two daughters, Valerie and Jacquelin, are citizens of the United States, residents of Miami, Florida, and members of the black race.

On July 26, 1973, Mrs. Brown and her daughters applied to petitioner for the admission of the two girls. Upon arrival, Mrs. Brown was handed a printed card reading:

"DADE CHRISTIAN SCHOOLS
6601 N.W. 167th Street
Hialeah, Florida 33015

" We are sorry . . . But the policy of the school is one of non-integration and we would request that you respect this policy.

School Administration."

Allegedly embarrassed and humiliated, Mrs. Brown and her children left the school premises. On August 6, 1973, the Brown family brought suit in the United States District Court for the Southern District of Florida, Miami Division, against Petitioner and its officers seeking compensatory and punitive damages and injunctive relief. The complaint alleged that the defendants had violated the plaintiffs' federally-protected civil rights by excluding the two Brown children from Petitioner's student body solely on the basis of their membership in the black race. Federal jurisdiction was said, in the complaint, to exist by virtue of, *inter alia*, 42 U.S.C. §1981 and 28 U.S.C. §§1331 and 1343. The action was assigned to United States District Judge Joe Eaton and given Case No. 73-1313-Civ-JE.

The defendants, on October 2, 1975, filed a detailed amended answer which admitted that the Brown children had been excluded from Petitioner's student body solely for racial reasons, but which denied that the Brown children's or their parent's civil rights had been thereby violated. In their third affirmative defense, the defendants addressed the plaintiffs' claims under 42 U.S.C. §1981 by asserting the following:

(1) Petitioner was an "operating affiliate" of the New Testament Baptist Church, Miami, Florida.

(2) The individual defendants were members of the New Testament Baptist Church.

(3) The educational facility to which the minor plaintiffs had sought admission was located on the premises of the New Testament Baptist Church.

(4) Since its founding, Petitioner's operating policies had been formulated by the New Testament Baptist Church.

(5) On several occasions after the founding of Petitioner and prior to July 26, 1973, the membership of the New Testament Baptist Church had resolved not to accept blacks into Petitioner's student body.

(6) That:

> "18. The resolutions referred to in paragraph 17 of this amended answer were based upon Biblical directives, as interpreted by the church leadership and membership, forbidding the commingling of the white and black races under circumstances which may tend to promote interracial marriage.
>
> "19. In light of the religious basis for the resolutions referred to in paragraphs 17 and 18 of this amended answer, the application to defendants of the federal statutes mentioned in paragraph 1 of the complaint so as to penalize defendants for their policy of excluding black students from Defendant Dade Christian Schools, Inc., would constitute a violation of the rights, privileges and immunities of defendants and those for whom they have acted under the Free Exercise of Religion Clause of the First Amendment to the United States Constitution and the Due Process Clause of the Fifth Amendment to the United States Constitution."

On October 24, 1973, counsel for the plaintiffs took the depositions of three of the four individual defendants: John M. Kalapp (vice-president and business manager of Petitioner), V. S. Ackerman (secretary-treasurer of Petitioner), and Arthur E. Kreft (superintendent of Petitioner). Each testified as to the religious underpinnings for Petitioner's admissions policy.

Accepting the recommendations of the parties, Judge Eaton adopted the deposition testimony and produced documentary materials as the trial record and limited the trial to

oral arguments of counsel based upon that record. No evidentiary hearings were conducted by the District Court.

On May 28, 1975, Judge Eaton rendered oral findings of fact and conclusions of law on the liability phase of the lawsuit. The District Judge found and concluded as follows:

1. The majority opinion in *McCrary v. Runyon*, 515 F.2d 1082 (4th Cir., 1975) was controlling, thereby subjecting Petitioner to the strictures of 42 U.S.C. §1981. Appendix A–1–3.

2. Petitioner had excluded the Brown children from its student body not on the basis of a generally held religious belief, but on the authority of a "policy" or "philosophy" which, although justifiable upon Scriptural grounds, was not entitled to protection under the Free Exercise Clause. Appendix A–10.

3. As evidenced by the absence of any literature published by Petitioner or its parent church articulating their beliefs on race relations, Petitioner's exclusion of blacks from its student body was based upon a "policy" or "philosophy" and not upon a "generally held religious belief" worthy of Free Exercise Clause protection. Appendix A–11.

4. The taking of a vote of the membership of the New Testament Baptist Church concerning the issue of racial integration was inconsistent with the existence of a "generally held, fundamental religious belief." Appendix A–12–13.

5. Dr. A. C. Janney's August 1, 1973, consultation with the membership of the New Testament Baptist Church concerning Petitioner's admissions policy was inconsistent with the existence of a "generally held, fundamental religious belief." Appendix A–14–15.

6. Because the beliefs underlying Petitioner's admissions policy were not "religious" for Free Exercise Clause purposes, no decision was being rendered "whether there is state interest of sufficient magnitude to override the interest of those claiming the protection of the Free Exercise Clause of the Constitution of the United States . . ." Appendix A–5.

Judge Eaton, on June 27, 1975, entered a judgment in favor of the Brown family and against Petitioner alone in the total sum of $5,500.00. He dismissed the claim for damages as to the individual defendants and enjoined the responsible officials of Petitioner from barring the Brown children from enrolling in Petitioner because of their race. Petitioner, on July 1, 1975, filed its notice of appeal to the Court of Appeals with the Clerk of the District Court.

The Court of Appeals, on October 6, 1975, ordered that Petitioner's appeal be heard by the *en banc* Court together with the rehearing *en banc* of Case No. 74-1976, *Riley v. Adirondack Southern School for Girls*, 522 F.2d 622. By letter dated December 23, 1975, the Clerk of the Court of Appeals advised counsel in both cases that no further action would be taken pending the decision of this Court in *Runyon v. McCrary* in which matter certiorari had been granted.

This Court, on June 24, 1976, affirmed the judgment of the Fourth Circuit in *Runyon v. McCrary*, 427 U.S. 160. On July 25, 1977, the Court of Appeals affirmed the judgment of the District Court in this case by a vote of 7 to 6. (556 F.2d 310) Appendix B. That voting alignment was constituted as follows:

(1) In an opinion written by Judge Hill, a *plurality* of *five* (5) members of the Court of Appeals (Judges Godbold,

Dyer, Morgan, Gee, and Hill) agreed with the District Court that Petitioner's underlying beliefs were not sufficiently "religious" to qualify Petitioner's admissions policy for Free Exercise Clause consideration. (556 F.2d at 311-314) Appendix B–1–9.

(2) In a *specially concurring* opinion, Judge Goldberg expressly disagreed with the District Court's determination regarding the allegedly insufficiently "religious" nature of Petitioner's underlying beliefs, but voted to affirm the District Court's judgment on the basis that Petitioner's rights under the Free Exercise Clause were subordinate to the rights of the Brown family under 42 U.S.C. §1981 and the Thirteenth Amendment to "make and enforce contracts" with Petitioner. (556 F.2d at 314-324) Appendix B–9–31.

(3) In a *concurring* opinion, Chief Judge Brown expressed no view with respect to the "religious" nature of Petitioner's underlying beliefs, but joined in Judge Goldberg's "balancing" of the conflicting rights of the parties. (556 F.2d at 314) Appendix B–9.

(4) In a *dissenting* opinion written by Judge Roney, *six* (6) members of the Court of Appeals (Judges Gewin, Coleman, Ainsworth, Clark, Roney, and Tjoflat) expressly disagreed with the District Court's determination regarding the "religious" nature of Petitioner's underlying beliefs and urged that the cause be remanded to the District Court for further proceedings focusing on the conflict between Petitioner's rights under the Free Exercise Clause and the Brown Family's rights under 42 U.S.C. §1981 and the Thirteenth Amendment. (556 F.2d at 324-326) Appendix B–31–35.

(5) Judge Coleman, in a separate *dissenting* opinion, emphasized his conviction that "no court should have the

power to compel any church to admit any student to any school operated for religious reasons." (556 F.2d at 326) Appendix B–35–36.

An analysis of the voting alignment of the judges of the Court of Appeals reveals the following:

(1) Seven (7) of the twelve (12) judges who addressed the issue of the "religious" nature of Petitioner's underlying beliefs (the *only* issue addressed by the District Court) were convinced that Judge Eaton had erroneously characterized Petitioner's underlying beliefs as not sufficiently "religious" to qualify the admissions policy for Free Exercise Clause consideration; nevertheless, the judgment of the District Court was affirmed.

(2) Of the twelve (12) judges who addressed the issue of the "religious" nature of Petitioner's underlying beliefs, only five (5) were in agreement with the District Court; nevertheless, the judgment of the District Court was affirmed.

(3) Only two (2) of the thirteen (13) judges who participated in the decision below reached the "balancing of rights" issue which the District Court had expressly declined to address; nevertheless, the views of those two judges on that previously undecided issue resulted in the affirmance of the judgment of the District Court.

REASONS FOR ALLOWANCE OF WRIT

QUESTION #1: DID THE DISTRICT COURT AND THE COURT OF APPEALS PLURALITY ERRONEOUSLY HOLD THAT THE BELIEFS UNDERLYING PETITIONERS ADMISSIONS POLICY WERE NOT SUFFICIENTLY "RELIGIOUS"

TO QUALIFY FOR PROTECTION UNDER THE FREE EXERCISE OF RELIGION CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION?

Resolution of this question requires the resolution of several important and sensitive subsidiary questions, as follows:

(a) Did the Court of Appeals plurality err by taking the position that Petitioner was without standing to assert the Free Exercise Clause rights of the New Testament Baptist Church, the membership of the church, and the students, parents, and teachers affiliated with Petitioner?

(b) Did the Court of Appeals plurality err in its adoption of the standard set out in Rule 52 (a), Federal Rules of Civil Procedure, for the appellate review of the District Court's findings of fact in this case?

(c) Did the Court of Appeals plurality err in its adoption of a narrow definition of the term "religious?"

(d) Did the Court of Appeals plurality err in its characterization of the evidence taken in the District Court proceedings?

As the discussion which follows shows, each of the foregoing subsidiary questions was the subject of vigorous disagreement among the judges of the Court of Appeals. In addition, each of the foregoing questions is one which has not been, but should be, settled by this Court or is one which has been ruled upon by this Court in a manner inconsistent with the approach taken by the Court of Appeals plurality.

Subsidiary Question (a)

Did the Court of Appeals plurality err by taking the position that Petitioner was without standing to assert the Free Exercise Clause rights of the New Testament Baptist Church, the membership of the church, and the students, parents, and teachers affiliated with Petitioner?

Judge Hill's plurality opinion implicitly denied Petitioner standing to assert the Free Exercise Clause rights of the New Testament Baptist Church, the membership of the church, and the students, parents and teachers affiliated with Petitioner in the following manner:

> "Here, however, a refusal by Dade Christian School to admit a black child was an institutional action taken by an institution whose patrons are, according to the evidence, divided in their beliefs on the religious justification for racial segregation. In such a situation the only practical course open to a Court is to examine the *corporate* beliefs of the institution involved, as adopted or promulgated or carried forward as an institutional concept. To do otherwise would allow the institution to pick and choose which of its members' potentially conflicting beliefs it wished to assert at any given time." (emphasis supplied) (556 F.2d at 313) Appendix B–7.

As pointed out in Part I-A of Judge Goldberg's specially concurring opinion (556 F.2d at 315-316, Appendix B–11–12), however, this Court has repeatedly recognized the standing of educational institutions to assert the constitutional rights of their constituents. In *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925), this Court, in invalidating an Oregon statute establishing criminal penalties for parents of children between the ages of eight and sixteen

years who were not enrolled in public schools, conferred standing upon religious and military schools to assert, on behalf of their students and the parents of their students, a Fourteenth Amendment-based freedom of educational choice. More recently, in *Runyon v. McCrary*, 427 U.S. 160, this Court unambiguously held that the defendant-private schools had standing to assert, on behalf of parents and students, First Amendment-based rights of privacy and free association as defenses to actions brought, as was the case here, under 42 U.S.C. §1981. 427 U.S. at 175, footnote 13.

Judge Roney's dissenting opinion has concisely stated the factual predicate for Petitioner's standing to assert the Free Exercise Clause rights of its constituents as follows:

> "A direct nexus exists between the New Testament Baptist Church belief in separation of the races and the desire to segregate the church school. The school and the church are intimately associated. Church leaders founded the school in reaction to the court decisions removing prayer from the public schools. *See, e.g., Engel v. Vitale*, 370 U.S. 421 (1962). The pastor is the president of the school. All teachers belong to the church. The church and the school use the same building. The only room the church does not use on Sunday is the principal's office. The policy of segregation in the school springs from a belief that the Bible commands separation of the races and school segregation is necessary to deter intermarriage. The connection directly parallels the interest of the Amish parents in *Yoder*, who kept their children out of public high schools to avoid 'worldly influences' which would interfere with a child's integration into the Amish faith community. 406 U.S. at 218. Consequently, the impact of §1981 on free exercise

cannot be dismissed as 'indirect'. *See, Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). The command of § 1981 is that commercially operated private schools must admit students without regard to race. *Runyon v. McCrary*, 427 U.S. 160. That imperative directly impinges on the free exercise rights of the New Testament Baptist Church." (556 F.2d at 325-326) Appendix B–34.

In light of the foregoing, the Court of Appeals plurality's position on the subsidiary question of Petitioner's standing to assert the Free Exercise Clause rights of its constituents is clearly in direct conflict with the Court's decisions in *Pierce v. Society of Sisters* and *Runyon v. McCrary, supra.* This conflict, Petitioner respectfully submits, warrants the issuance of this Court's Writ of Certiorari to the Court of Appeals.

Subsidiary Question (b)

Did the Court of Appeals plurality err in its adoption of the standard set out in Rule 52 (a), Federal Rules of Civil Procedure, for the appellate review of the District Court's findings of fact in this case?

Judge Hill's plurality opinion explicitly adopted the appellate review standard of Rule 52 (a), Federal Rules of Civil Procedure, to this case when it declared:

"As pointed out in the dissenting opinion of Judge Roney, the trial court could have found this the exercise of religion by a congregationally organized church wherein every believer is his own priest. This is to say, the finder of fact in this case might have, from the evidence, found the facts to be different from the resolution actually reached. But he did not,

and it was his duty to weigh the evidence. Ours is to determine whether or not there was sufficient evidence upon which to base the finding. F.R.Civ.P. Rule 52, 28 U.S.C.A." (556 F.2d at 312, footnote 4) Appendix B–5.

In Part I–B of his specially concurring opinion (556 F.2d at 316-317, Appendix B–14–15), Judge Goldberg, citing this Court's decisions in *Cox v. Louisiana*, 379 U.S. 536, 545 at n. 8 (1965), and in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), noted the following with respect to the applicable standard of review in First Amendment matters:

"Even had the district court framed the issue properly, the plurality's reliance on its views would be improper. Whether particular beliefs constitute 'religion' is not simply a question of fact. The inquiry is a mixed question, a question of the application of law to facts. Our responsibility to exercise our own independent judgment on the issue is therefore much greater than the plurality acknowledges.

"The plurality's departure from the proper review standard is particularly troublesome under the circumstances here. First, this is a first amendment case, and our jurisprudence has long recognized the freedom of appellate courts to reassess the facts in such cases. Our precious first amendment liberties have never been entrusted solely to the whim of some trier of facts. Indeed, the pluraiity opinion illustrates precisely how an ostensible 'finding of fact' may mask a series of value-laden assumptions in this difficult area. When 'finding of fact' carry such grave implications, review should never be cursory. All levels of the judicial force have an obligation to main-

tain an unrelenting vigil over first amendment freedoms.

"Moreover, in this case there is no justification whatsoever for reliance on the district court's factfinding. The district court heard not a single live witness. The parties submitted the case on the basis of depositions and exhibits only. We have available to us all the sources from which the district court drew its conclusions, and we see them in the same form as did the trial judge. The record consists of a single volume, assorted documents and a cassette recording; reaching our own conclusion with respect to whether these beliefs constitute 'religion' does not impose a significant burden on appellate resources. To defer to the district court rather than undertake a de novo determination of this important issue is to abdicate our solemn right only after careful reflection. I believe we should ourselves assess the record to determine whether the beliefs in question are 'religious'."

Although Judge Roney's dissenting opinion did not explicitly address the question of the applicable standard for appellate review, his views reflect a careful and independent review and analysis of the materials considered by the District Court.

As the foregoing establishes, this Court in the past has not hesitated to undertake independent reviews of the factual bases for First Amendment claims. The Court of Appeals plurality's refusal to make such an independent review was in direct conflict with this Court's decisions. This conflict, Petitioner respectfully submits, warrants the issuance of this Court's Writ of Certiorari to the Court of Appeals.

Subsidiary Question (c)

Did the Court of Appeals plurality err in its adoption of a narrow definition of the term "religious?"

Noting that Petitioner and the New Testament Baptist Church have not published any literature articulating religious objections to racial integration in schools, Judge Hill's plurality opinion found the absence of such materials relevant in assessing the "religious" character of the belief underlying Petitioner's admissions policy:

"We do not hold that a belief must be permanently recorded in written form to be religious in nature. However, the absence of references to school segregation in written literature stating the church's beliefs, distributed to members of the church and the public by leaders of the church and administrators of the school, is strong evidence that school segregation is not the exercise of religion." (556 F.2d at 312) Appendix B–4–5.

Judge Hill's plurality opinion commented critically upon the susceptibility of the church's position on the racial integration of Petitioner to change:

"Five days prior to the filing of this suit, the minutes of the church disclosed the following:

Dr. Janney explained to the congregation the decisions that had been made by the church in previous years in regard to integration. He also explained that he would follow the previous dictates of the church in this area *unless instructed otherwise by the membership.* (emphasis added)

"We agree with the trial judge that the indication that contested belief would be subject to change upon the direction of the congregation comports with the social or political nature of the exclusionary policy." (556 F.2d at 312) Appendix B–5.

Finally, Judge Hill's plurality opinion indicated that the trial judge had properly considered the relatively recent genesis of Petitioner's beliefs in gauging the "religious" character of those beliefs:

"From the above, and other evidence, the trial judge concluded that, if belief in school segregation was religious in nature, neither the officers of the school nor the congregation of the church were aware of it. He found that as social conditions changed and the issue arose, a policy was formulated by the school leaders. While a religious belief may be of recent vintage or formed instantaneously, the trial judge's conclusion that school segregation was nothing more than a recent policy developed in response to the growing issue of segregation and integration was amply supported by the evidence." (556 F.2d at 313) Appendix B–6–7.

Recognizing the grave Establishment Clause implications of the plurality's implicit definition of the concept of "religion", Judge Goldberg, in Part II of his specially concurring opinion (556 F.2d at 317-318, Appendix B–15–18) argued that, for Free Exercise Clause purposes, a liberal definition of "religion" was essential. Of particular note are the following passages from Part II of his specially concurring opinion:

"History records abundant instances of religious persecution. Although some have been directed at established religions, probably most have impinged upon religious heretics who were, at least initially, without an organized following and without an institutionalized catalog of their beliefs. Religious heterodoxy often becomes orthodoxy, but the transformation need not be instantaneous. Well-chartered dogmas and creeds are not necessary to a new or even to an old religion. The plurality's focus on the lack of such attributes raises the possibility that first amendment protection would be withheld from those who need it most. Indeed, it is at least unclear whether the plurality would accord first amendment protection to a modern Martin Luther or Roger Williams. The framer of the Bill of Rights would undoubtedly be dismayed to learn the restricted scope today suggested for the religion clauses. I cannot emphasize too strongly how grievously I believe the plurality errs by unconsciously importing into its test for defining 'religion' its own views about how a church should be organized, how it should express its views, and how an individual should manifest his or her religious beliefs." (556 F.2d at 317) Appendix B–15–16.

* * * * *

"Religions can have abhorent principles; most religious practices are benign, benevolent and beneficient. But we should not judge a religion by its practices. One era's spiritual error is another's heralded religion.

"No one would deny that the ten commandments are 'religious', but religious principles need not be etched in stone or handed down from Sinai. A free exercise claimant can carry its evidentiary burden without producing in court a burning bush. While I attempt no cosmic definition of religion, it is clear that God and the mundane combine in the religion of the church under examination today. This church had a God-derived cosmos." (556 F.2d at 318) Appendix B–17–18.

As did Judge Goldberg, Judge Roney in his dissenting opinion found constitutional fault with the plurality opinion's definition of the term "religious." Judge Roney posited in his dissenting opinion a tri-partite test for weighing the "religious" character of a belief: (1) whether the belief is based on a theory of man's nature or his place in the Universe; (2) whether the belief is not merely a personal preference, but has an institutional quality about it; and (3) whether it is sincere or not. (556 F.2d at 324; Appendix B–31–32.) The following excerpt from Judge Roney's dissenting opinion shows how Petitioner, in Judge Roney's view, met each facet of that test:

"The belief of the New Testament Baptist Church in separation of the races meets all these requirements. First, the church bases its belief on a system of theology derived from the Bible. The church infers a duty to segregate from the story of the Tower of Babel, the confusion of tongues in the Gospel of Acts, and certain statements of St. Paul. For church members, racial intermarriage is a sin, though not a mortal one.

"The plurality seeks to discredit the theological basis

of the belief in segregation by noting it was adopted by a congregational ballot. The 1963 vote to exclude blacks from membership, the plurality observes, does not reflect religious belief because it could be repealed. Following that logic, no church which has a congregational, or even representative, form of government could be said to have any beliefs protected by the First Amendment, because church members, either directly or through elected representatives, control the content of church creeds. Such a holding is untenable. It discriminates among religions in violation of the Establishment Clause, and ignores the doctrine that questions of church government are beyond the scope of judicial review. *See Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

"Second, the belief is not a mere personal preference but has found institutional expression, both in church teachings and in the operation of the school. The congregation voted to exclude blacks. At least one sermon delivered by Dr. Janney, the church's founder, has articulated the Biblical theory of segregation. The school lost its federal tax exempt status because it refused to sign a statement of nondiscrimination. The school edits teaching materials to exclude pictures of 'multi-ethnic' groups. The school promulgated the policy card given the plaintiff.

"The plurality seeks, in effect, to discount this institutional expression. The failure of written church documents to refer to segregation is said to show segregation is not a tenet of the church. However, a religious practice does not have to be written to enjoy First Amendment protection. *State v. Yoder*, 49 Wis.

2d 430, 182 N.W.2d 539, 541 (1971), *aff'd*, 406 U.S. 205 (1972). Furthermore, the failure of examined documents to mention segregation may simply mean that segregation was such a well accepted belief of the membership that the church leaders felt the congregation did not need any rules to guide its conduct in that respect. The 1963 church vote was unanimous. Finally, limited protection to written beliefs discriminates unfairly against sects which are small or new, and so have not developed the elaborate theology of more traditional religious groupings. The impact of such discrimination on the defendant church's ability to prove its case is clear. It was forced to rely solely on documents generated by its less than 4,000 members during the short 22-year history of the church. The trial court rejected writings by authors who were not church members, on the grounds that no one other than Dr. Janney was proved to have read them.

"The third question to be considered is whether the belief in segregation is sincere. The trial court said in this regard '[t]here is no doubt that it is a sincerely held belief and the Court recognizes the sincerity. . .' Though the trial judge and the plurality impeach that sincerity by noting the recent vintage of the church statements concerning segregation, the record does not show any attempt to (adopt) religious nomenclature and cynically (use) it as a shield to protect them when participating in antisocial conduct that otherwise stands condemned.

"*Kuch*, 288 F. Supp. at 433. Furthermore, timing alone should not discredit the sincerity of a religious belief. While the founding, or even expansion, of a

school to accommodate white students seeking to evade a court order increasing the degree of desegregation in the public schools may well call sincerity into question, this record shows no evidence of such conduct. Absent such a manipulative purpose, application of established doctrine to changing social or technological circumstances should be protected, because it lies at the heart of a living faith." (556 F.2d at 324-325) Appendix B–32–34.

In the past, this Court has had occasion to assess the "religious" character of intensely personal beliefs, which beliefs were not surrounded by such accepted guideposts as references to the Bible, the existence of an ordained clergy, and the erection of large physical structures for congregational activities. See, e.g., *United States v. Seeger*, 380 U.S. 163 (1965), and *Gillette v. United States*, 401 U.S. 437 (1971). Standing in stark contrast to these conscientious objector-based assessments of the "religious" nature of professed beliefs, Petitioner has been told by the District Court and by the plurality of the Court of Appeals that its beliefs in the need to racially segregate its student body are not "religious" notwithstanding that: (1) Petitioner is formally incorporated under the laws of the State of Florida; (2) Petitioner is an operating affiliate and mission of an established church which has constructed a large physical plant housing both Petitioner and the church; (3) that Petitioner and the church are headed by an ordained clergyman; and (4) Petitioner's underlying beliefs are founded upon an interpretation of the Bible.*

As reflected in the opinions of Judges Goldberg and Roney,

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* For a scholarly treatment of essentially this very question, see *Stevens v. Berger*, 428 F. Supp. 896, 899-905 (E.D.N.Y., 1977). See, also, *State v. Whisner*, 47 Ohio St.2d 181, 351 N.E. 2d 750, 761-2 (1976).

the Establishment Clause implications of the plurality's reasoning are profoundly disturbing. Because Petitioner's beliefs may well strike the members of the Court of Appeals plurality (and many individuals and groups in our society) as potentially anti-social, those beliefs have been subject by the plurality to a series of unprecedented legal tests which, in the plurality's view, Petitioner has failed. Surely, the erection by the Court of Appeals plurality of such formidable obstacles to Free Exercise Clause protection requires that this Court, in the exercise of its statutory discretion under 28 U.S.C. §1254(1), grant petitioner a Writ of Certiorari.

Subsidiary Question (d)

Did the Court of Appeals plurality err in its characterization of the evidence taken in the District Court proceedings?

Judge Hill's plurality opinion undertook a brief review of the deposition testimony given in the District Court phase of this case by Mr. Kreft (Petitioner's principal), Mr. Kalapp (one of Petitioner's incorporating officers), and Mr. Ackerman (Petitioner's secretary-treasurer from 1961 to 1966). (556 F.2d at 312-313, Appendix B–5–6.) That review emphasized those portions of the testimony referring to the administrative evolution of Petitioner's admissions policy and came to the same conclusion as that reached by the District Court: Petitioner's belief in educational segregation was not religiously based.

It is interesting to note, however, that Judge Goldberg, in Part III of his specially concurring opinion (556 F.2d at 318-320, Appendix B–18–22) reviewed those same deposition transcripts with an emphasis upon the Biblical and spiritual underpinnings for Petitioner's beliefs and admissions policy

and concluded that Petitioner's beliefs were "religious" for Free Exercise Clause purposes.

Although Judge Roney's dissenting opinion did not review the deposition testimony on a witness-by-witness basis, its general thrust was that Petitioner's belief was "religious" in basis and origin. Indeed, Judge Hill's plurality opinion was compelled to concede:

> "As pointed out in the dissenting opinion of Judge Roney, the trial court could have found this the exercise of religion by a congregationally organized church wherein every believer is his own priest. This is to say, the finder of fact in this case might have, from the evidence, found the facts to be different from the resolution actually reached. . ." (556 F.2d at 312, footnote 4) Appendix B–5.

Petitioner respectfully endorses the conclusions reached on this point by Judges Goldberg and Roney. Taken as a whole, the deposition testimony given by Petitioner's officials in the District Court phase of this action compels the conclusion that Petitioner's beliefs with respect to racial integration of its student body were "religious" for First Amendment purposes.

Although, taken by itself, the failure of the plurality opinion written by Judge Hill to assess the deposition testimony in a balanced fashion may not warrant the issuance of this Court's Writ of Certiorari, Petitioner submits that this failure, when considered along with the other, extraordinary aspects of the plurality opinion, is highly significant because it reflects a niggardly attitude on the part of the plurality to Petitioner's claim to Free Exercise Clause protection. Petitioner respect-

fully submits that there is nothing in this Court's Free Exercise Clause jurisprudence which lends support to that attitude.

QUESTION #2: DID THE TWO CONCURRING JUDGES OF THE COURT OF APPEALS ERRONEOUSLY HOLD THAT PETITIONER'S RELIGIOUS BELIEFS WERE OUTWEIGHED BY THE RESPONDENTS' RIGHTS TO MAKE AND ENFORCE CONTRACTS AS GUARANTEED BY 42 U.S.C. § 1981 AND THE THIRTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

This Court, in *Runyon v. McCrary*, 427 U.S. 160 (1976), observed:

> "It is worth noting at the outset some of the questions that these cases do not present. They do not present any question of the right of a private social organization to limit its membership on racial or any other grounds. They do not present any question of the right of a private school to limit its student body to boys, to girls, or to adherents of a particular religious faith, since 42 U.S.C. § 1981 is in no way addressed to such categories or selectivity. *They do not even present the application of § 1981 to private sectarian schools that practice racial exclusion on religious grounds.* 6/" (emphasis supplied) 427 U.S. at 167.

Footnote 6 to this Court's majority opinion in *Runyon v. McCrary* cautioned:

> "Nothing in this record suggests that either the Fairfax-Brewster School or Bobbe's Private School excludes applicants on religious grounds, and the Free Exercise Clause of the First Amendment is thus in no way here involved." 427 U.S. at 167.

As noted earlier in this petition, Judge Goldberg and Chief Judge Brown of the Court of Appeals reached the issue of the balance to be struck between Petitioner's rights under the Free Exercise Clause and Respondents' rights under 42 U.S.C. § 1981 and the Thirteenth Amendment and struck that balance in favor of Respondents. Judge Hill's plurality opinion expressly declined to reach that issue (556 F.2d at 312, Appendix B–4) and Judge Roney's dissenting opinion argued that the cause should be remanded to the District Court for an initial resolution of that issue (556 F.2d at 326, Appendix B–35). Judge Coleman's dissenting opinion (556 F.2d at 326, Appendix B–35–36) may well have reached that ultimate issue and resolved it in Petitioner's favor.

Without the concurring votes of Chief Judge Brown and Judge Goldberg, the Court of Appeals would have been compelled to reverse the District Court's judgment and to remand the cause for further proceedings. In light of the critical role which those two concurring votes played in the formulation of the judgment of the Court of Appeals and in the light of this Court's specific reservation of this very issue in *Runyon v. McCrary, supra*, Petitioner respectfully submits that this Court, should it resolve Question #1 favorably to Petitioner, is in an excellent position to consider the merits of Question #2. Clearly, this issue presents an important question of federal law which has not been, but should be, settled by this Court.

CONCLUSION

This petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, Case No. 75-3260, should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing petition were mailed this 27th day of October, 1977, to Ellis S. Rubin, Esq., Attorney for Respondents, 265 N.E. 26th Terrace, Miami, Florida 33137.

LAWRENCE R. METSCH

Appendix A–1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NUMBER 73-1313-Civ-JE

JOHNNY BROWN, JR., etc., et al.,
Plaintiffs,

vs.

DADE CHRISTIAN SCHOOLS, INC., etc., et al.,
Defendants.

(Filed May 28, 1975)

FINDINGS OF FACT and CONCLUSIONS OF LAW

What this Court is about to say constitutes findings of fact and conclusions of law on some of the issues in the case, but not all, as you agreed.

When this case was filed there were pending in the United States Court of Appeals for the Fourth Circuit, the case of McCrary v. Runyon and the Southern Independent School Association, two cases, consolidated. Everybody involved in this case before this Court recognized that that case would control the initial question before this Court. I think it fair to say, and the Court announces this as being true, that the facts in the Fourth Circuit Court of Appeals case comport with the facts in this case and we, in the exercise of sound judicial judgment, waited until that case was decided. It took considerably longer to decide than we had thought it would, but for reasons of the appellate process, and because of the consequences of this case, I know from some experience that that

procedure was a wise one to follow.

Now, the Fourth Circuit Court of Appeals divided four to three on the primary question and it is not necessary to recite the primary question. You all know what it is. I shall simply say briefly that the question there was whether a school which holds itself out generally to the public, though it is referred to as a private school, that means one with no state funds, not supported by governmental funds, whether such a school may, by choice, exclude black applicants on the basis of the fact that they are black, there being no nexus between government and the operation of the school.

The first thing that is important to understand in this cause is that the plaintiffs did not present a constitutional question. This is not an equal protection type case. This is not a constitutional question at all as presented by plaintiffs. It is the defendants who have raised the constitutional question as a defense. This case, as did the Court of Appeals' case referred to, turns upon the interpretation of the old civil rights statute regarding non-discrimination in contracts, a law passed by Congress back in the 1890s.

The United States Court of Appeals, in McCrary, held in a divided decision, that the statute did in fact apply when an applicant seeks entry into a school, even though that school has no nexus with government as far as funding, control, etc.

The Court held that it was, in fact, a contractual arrangement that was being applied for and that if a party was discriminated against because he was black, that that statute would apply and would preclude such discrimination.

A Federal Judge in Virginia by the name of Bryan originally ruled that and the ruling was upheld, was affirmed by the Court

of Appeals by a four to three vote. That case is controlling here and the Court, of course, will follow it.

There is presently pending in the Fifth Circuit Court of Appeals a case which went up well after the McCrary case was lodged in the Fourth Circuit Court of Appeals. The case is not directly in point with this one but it is related and it is my professional opinion that that case will be some time in being decided. I would not be surprised at all if the Court were embanked for that determination. Having waited as we did, having understood that we were looking to the Fourth Circuit teachings and because the Fourth Circuit case is directly on point and the Fifth Circuit case is not directly on point, this Court will, in fact, make the rulings that it is making now. I would not be at all surprised if the Fifth Circuit in the related case ruled to some degree contrary to the ruling of the Fourth Circuit, but District Courts cannot anticipate that. I would not be at all surprised if the Supreme Court of the United States ruled contrary to the four to three ruling in the Fourth Circuit, however, this Court follows the law as it is written and does not have the right to anticipate rulings because, of course, it does not know what they are going to be.

Therefore, having ruled that McCrary v. Runyon is controlling in the case before this Court, the Court adopts that majority rule. That leads us then to the matter which is here for specific ruling today. That ruling is in fact a purely factual determination. It turns entirely upon fact and the ruling constitutes findings of fact.

We must be certain that we are applying the proper test as we answer the factual issue. These gentlemen have said to the Court that the factual issue really is whether or not the Brown children were excluded from attendance because of a sincerely held religious belief, meaning, I think, sincerely

held by the leadership in the school, by the defendants.

Now, we must remember in that connection that we are not here considering a conscientious objector application where the Courts look to determining whether or not a particular applicant sincerely holds a religious belief, thereby causing him to be entitled to a conscientious objector status because that sincerely held religious belief is one which would exempt him from bearing arms.

We are here concerned with whether or not the leadership in the school, or the school itself, excluded the Brown children because of a generally held religious conviction, a generally held tenet of religion. In other words, we are not talking about whether one individual out there operating the school may have had some particular fundamental belief, or one person in the church had a particular fundamental religious belief, but whether there was a generally held, recognized, fundamental religious tenet of the school through its leadership.

As an example, as was discussed in the Wisconsin v. Yoder case. There they were dealing with whether or not the Amish had this generally held religious conviction that was being discussed in that case.

Now, with that brief comment, the Court accepts the issue as presented by the parties, that is, whether the Brown children were excluded because of a sincerely held religious belief, which if the Brown children had been accepted, their admission would have violated the free exercise of religion clause of the United States Constitution.

The answer to the factual issue is quite clear to this Court. It is taken from the candid and honestly stated words of Dr. Janney and of the deponents in the depositions that were

presented to the Court, and from the documentary evidence in this case.

However, before I recite those facts which led the Court to the conclusion it has reached and will here announce, I want to make a couple of statements which I think are important to be made prior to the factual discussion that will follow.

The first is that the validity of what one believes cannot be questioned by the Court. Courts cannot reject religious beliefs because they consider the beliefs even to be incomprehensible, according the language of Mr. Justice Douglas and the Supreme Court, and this is repeated throughout the cases. So, this Court is not at all, in the process of this ruling considering the validity of the belief professed, that belief having been professed as follows: That the commingling of the races is nonscriptural; that the commingling of the races in a school would lead to intermarriage and that portions of the Old Testament and of St. Paul's letters, epistles to the churches suggest that commingling of the races is as expressed by the pastor nonscriptural.

The second thing that the Court should like to make clear is that because of the nature of this ruling, we shall not reach the issue of whether there is state interest of sufficient magnitude to override the interest of those claiming the protection of the free exercise clause of the Constitution of the United States, because the factual issue that shall be determined forecloses any consideration of that question.

Perhaps a statement by Mr. Kalapp summarizes the facts in this case. I give you this statement first because of its impact and then in the future findings of fact I shall discuss why Mr. Kalapp's statement was true and sound. In speaking of a policy against admission of blacks to the school and in answer to this question, "How was that policy adopted?" Mr. Kalapp

responded, "I don't think it," that is the policy, "was adopted at a specific time as I recall it. I think it was something that evolved as a philosophy and a policy over a period of a number of meetings." Now that is a factual summary of this matter and that factual summary was made by Mr. Kalapp.

I point out here that when the Brown children received the note explaining that the school was sorry that its policy was one of non-integration, the school itself announced a policy, not a fundamental religious concept or belief.

I do not propose to be facetious in any way by making this statement, and I do recognize, this Court does recognize, that these defendants hold a sincere belief that their policy, their philosophy which evolved, was right, and that it, in fact, in their minds can be justified in the Scriptures, but a policy, a philosophy which evolves over the passage of time from 1961 until 1973 simply does not constitute that type of sincerely held religious belief, fundamental belief, which is protected by the free exercise of religion clause of the United States Constitution. I mention that I do not want to be facetious and I do not wish to be argumentative, but I do say to you that the Old Testament and the Acts of the Apostles and St. Paul's epistles have been around a long time. St. Paul lived and wrote in the first century, by our calendar. So that it seems to me that a philosophy that evolves as social conditions change, as sincerely held as that philosophy may be, does not rise to that fundamental religious belief or practice which is protected by the free exercise of religion clause of the Constitution.

Now, not only did Mr. Kalapp quite honestly summarize the situation, but the principal of the school, on deposition, Mr. Kreft, answered the following question: "Who instructed you regarding the policy of non-integration?" His answer was, "The specifics of who instructed me? We didn't have a specific

board meeting that I can recall. Basically it would be more or less the Board of Directors of the school who would direct me regarding the policy of enrollment."

Now we come to the factual matters that the Court has noted which clearly and abundantly bear out the summary that I have just given you as stated by Mr. Kalapp.

According to the testimony in this case the school was founded because those in executive capacity of the New Testament Baptist Church discussed the need for a Christian school as a fallout of the removal of the Bible reading and so forth from the public schools. This discussion occurred somewhere in the early 60's because the literature says that the school was founded in 1961. It was incorporated in 1962.

Now, this Court can take and does take judicial notice that within this very district so-called school integration cases in the public schools were in progress. I know that the one in Palm Beach County was in progress because I ended up with it many years later and I am sure it was started in 1956. But this school was founded because of the need that was felt by the executive people there, and I use the term that was used in the answer, those of us in executive capacity, (I assume the gentleman was speaking of those in the church.) a need for a school as a fallout of the removal of Bible reading and so forth in the public schools, not because of some fundamental religious belief about commingling of the races, and when the Articles of Incorporation were drafted and accepted, they contained an article, namely Article Three, which reads in part as follows:

> "The membership of this corporation," not referring now to students, "shall consist of any and all competent persons of good moral character who sympathize with and in good faith wish to participate

in the purposes and objects herein expressed."

No reference there to any fundamental religious tenet or conviction referencing commingling.

Mr. Verle S. Ackerman was associated with the school for about the first five years of its existence. He had not been associated with it for about six years immediately prior to the taking of his deposition. Mr. Ackerman was one of the first officers of the corporation. He was the secretary-treasurer. He states that he knows of no resolutions that were ever adopted by the Board alluding to the fact that no blacks would be admitted to the school. He was there for the first five years. When he was asked if up to the time he left there was any policy that had evolved concerning enrollment of black students he answered, "Not to my knowledge," and this is of considerable importance, "The issues in the first five years were not very strong issues in those days, because even in our public schools, the integration was just very token, and just beginning at that time." He said there were no directives issued prohibiting blacks from enrolling, "because it had never arisen. We never faced that," again indicating, as expressed by Mr. Kalapp, that the policy evolved as the issue arose, as the Board or leadership began to concern itself with whether or not black children might apply.

Mr. Kalapp, who was one of the incorporating officers, stated on his deposition that the policy, I underline his language, "came into being on a very gradual basis, because in the very early days of the school there was no such conversation in regard to integration." At some point later the school, he said, "decided that a school philosophy needed to be adopted in view of the fact that it had gotten to be such a topic of conversation, . . . because of all the furor in the newspapers and other news media that was being brought about by such things as busing

and forced integration in schools." Hence the evolution of what he refers to as the philosophy and the policy that developed over a number of meetings.

The principal, when asked, "Is there a requirement that students have to be of the Caucasian race?" he replied, "The only way I can refer to that would be to the particular point that there was a policy generally described to me as 'we should not have integration of the races,' so I generally knew there was going to be a position of the school." He said this in connection with his coming to the school as the principal. He said that this decision was made about the time he was moving to the school and when asked if he was aware of any Biblical directive which forbade the commingling of blacks and whites, his answer was as follows:

> "If I interpret the Biblical directives? Say policy or written statement, I would simply refer to the ballot in the minutes. I don't know of any other dictates, so-to-speak, written. It is my duty to follow the policy."

So, the principal quite candidly, quite properly, states that he knows of a ballot and he simply follows the policy given to him. The principal did not exclude, and I realize that he was not the particular individual present that particular day, but he did not exclude these children because of a fundamental religious tenet. He was following policy. Now we find later that Dr. Kreft does not disagree with the policy and that he, as the other people have, has a very sincere belief that the policy is correct. He said that he was not aware of what Dr. Janney based the forbidding of the commingling of blacks and whites upon. He said that basically he got his directive from Dr. Janney. If it had to do with finances he would go one place and other places for other ones, but generally from the Board and Dr. Janney, of

course. He said he wasn't aware of what the forbidding of commingling of blacks and whites was based upon. His answer was, "Just by general references. Now, I don't know of a specific position, other than policy directives."

If the reason for excluding the children grows to the position of a fundamental religious practice or belief protected by the free exercise clause of the United States Constitution, it certainly is a reasonable inference that the principal would have known it and would have adhered to it for that reason. He stated that if there where any written material published by the Church that would indicate danger from interracial marriages that he would know of it and that he did not know of any such written material. He didn't know whether there was any teaching about socialization leading to interracial marriage and he said, "All I know is that this was the philosophy adopted by the Board, that the philosophy would be that it would be contrary to God's precepts and teachings to commingle the races and that the policy was not distributed through any of the literature of the school."

Now, I mention that these people, in good faith, have concluded that their philosophy can be reconciled with certain passages in the Old Testament and a certain writings of St. Paul, and that statement was made after the institution of this law suit and Dr. Kreft quite candidly and honestly stated what he knew to be the position of the leadership there.

Now we come to a discussion of some of the documentary evidence in the case, but before I do that, I want to make a further finding of fact on what I have just mentioned with reference to literature about intermarriage which fits in with what I am about to say about the application for admission to the Dade Christian School.

A basic, fundamental t[illegible]et, one that, as expressed in one place in Yoder, pervades t[illegible] thinking, the way of life of a certain group, certainly is one which is discussed in the school, certainly is one upon which literature is written and available in the school. It is not at all unusual for a group of persons to have fundamental religious beliefs about intermarriage. We are really not talking here directly about intermarriage, but about having such a fundamental religious belief, which it is reasonable to infer would be discussed and written about in the school of that particular religious group.

Now, Exhibit eight includes an application for admission to the Dade Christian School. The face sheet sets forth nine specifics under the heading of "We Believe." Those beliefs would appear to the Court to be the basic religious beliefs, the fundamental religious beliefs, religious tenets of the Dade Christian School. Where, in the listing of those things which "we believe" is there a tenth fundamental religious belief that there should be no commingling of the races? If a fundamental religious tenet exists, is believed, there is no reason why it would not be among those listed. It should be a belief of which one is proud and to which one adheres.

On the portion of the application for admission to be filled out by the student, the student is asked whether or not he will agree not to dance whatsoever, whether at home or school or elsewhere, which is undoubtedly a sincerely held belief. The student is asked whether he agrees not ever to be critical and not ever to even talk about narcotics, all of which the school has every right to ask. It seems to me that if those details are discussed with an applicant and those commitments extracted from an applicant, a fundamental religious belief regarding commingling and socialization among races must be a part of the application if it were, in fact, that type of religious tenet protected by the Constitution.

On July 17, 1963, a vote was taken. This is a year or two after the school was founded, regarding whether or not the Church would integrate or remain segregated. Approximately 165 people, according to the evidence presented to the Court, voted and all voted for segregation. The Church was founded, I believe, in 1954. The Bible was studied carefully, I am sure, under Dr. Janney's leadership. I can tell that from hearing him speak. The reading and study of the Bible is of vital importance to these people, as it should be. It simply does not follow that a vote must be taken as to what is a fundamental religious tenet. It either is or it isn't a fundamental religious tenet. Would it be necessary to take a vote, for example, on the question of "Shall we continue to have prayer in our services?" That is a fundamental religious practice and no such vote would be necessary. Not only that, but this vote was presented on a ballot which contained other questions. I cannot tell from the record what all of them were, but I know one of them had to do with whether or not a youth camp should be retained or something about the future of a youth camp. Another seemed to have to do with the method of visitation or ministry and enlarging the congregation, and included with those questions was the question, "Should we have segregation or integration?" So, you can see that as the situation developed the people at the Church were formulating a position and a policy by vote, which is a very democratic way to do it. The Court is not complaining at all about that, nor about the policy or the philosophy of the church. The Church, however, in a deposition of Mr. Kreft, the principal of the school, said this is up to every individual member of the church. These people would not be required to answer a question of their particular belief in this matter.

A generally held, fundamental religious belief is one recognized by the group as a fundamental belief. Therefore, the vote and the statement that it is up to the individual belies the proposition that the defense is such factually as to be protected

by the free exercise clause of the Constitution. There is no doubt that it is a sincerely held belief and the Court recognizes the sincerity, but their belief is not such as is protected by the free exercise clause of the United States Constitution because it is a philosophy, a policy, a sincere belief arrived at subjectively.

There were a few comments on those 165 ballots in reference to question number two, which bear out the evolution of this policy as discussed by Mr. Kalapp. One of the comments, as an example, was "Segregation is the only course of action." Another, "Segregation is wise." Another, "When you integrate, I separate." And perhaps the most interesting one, "I believe that the stand for integration we have taken is a wise decision." We have taken a position. We have taken a stand. We have formulated a policy in which we believe.

The principal, in speaking of the individuality of belief that I have referred to, when asked if there were approximately four thousand people who adhered to the belief, answered, "No, I would say that. I would just say that those that have responded would have to be counted, but they would not be required to answer a question of their particular belief in this matter."

When Mr. Kalapp was asked if the concept of no socialization between the races is a major theme of his religion, he answered, "Very minor." A very minor theme. He said that it is up to the individual's interpretation of the Bible.

The principal said that if a black student were to be enrolled that that would not destroy his exercise of religion, but that it would erode his religious liberties. The principal said that it was intermarriage that his belief prohibited and to admit black students would give rise to a specific potential of inter-

racial marriage because to admit the Brown children would set a precedent. Mr. Kalapp also said, when asked if blacks were to be enrolled would it endanger his religious beliefs, "If it culminated in an intermarriage situation between the races."

All of these answers show that there was concern particularly about interracial marriage. One can have a fundamental religious precept about interracial marriage and teach it, but we are talking about admission of a black student to a school. The concern is, according to the depositions, that that could very well lead to intermarriage in the future, because we expect them to be young when they come here and many of them go through the twelfth grade.

I really think that the closer precept to that which would be protected by the Constitution is one which these people express with regularity, a fundamental precept against intermarriage and the concern is a social concern, a practical concern, and a sincerely held philosophy, but not one of their nine beliefs.

This suit was filed August 6, 1973. It was served on August 9, 1973. An answer was filed on August 27, 1973. Apparently the leadership had not had an opportunity to communicate to its excellent lawyer the fact that admitting blacks would violate the free exercise of their religion, because it was September 2nd, 1973 when that position was first expressed in this litigation.

The record does not tell us when Dr. Janney delivered his message which is taped and in evidence here, but it does tell us that on August 1, 1973, five days before the suit was filed and after the application of Brown children, the church clerk entered the following minutes of the business meeting of the church:

> "Dr. Janney explained to the congregation the decisions that had been made by the church in previous years in regard to integration. He also explained that he would follow the previous dictates of the church in this area unless instructed otherwise by the membership."

I commend Dr. Janney for looking to the congregation. That is not the point. Dr. Janney sounds to me like a man of such sincerity in his beliefs that he would not abandon a sincerely held fundamental religious precept because the majority directly directed him to do otherwise. That simply, in the language of Dr. Janney, as recorded in these minutes, demonstrates policy position, philosophy, not fundamental religious beliefs.

There are three pamphlets in evidence. They are exhibits one, two and three. I don't know who introduced them, or why, but I expect that it was to show that there were in fact writings and addresses on religious matters, including the question of "Segregation or Integration, What saith the Scripture?" Exhibit One is an address by Dr. Bob Jones, Sr., in 1960, entitled "Is Segregation Scriptural?" Exhibit Two is a discussion of "Segregation or Integration, Which?", a sermon by the pastor of the Dayton Baptist Temple, Gerald O. Fleming, in Dayton, Ohio, in 1956, shortly after the first case on school integration, a 1954 case. Exhibit Three, "Segregation or Integration. What saith the Scripture?" by Peter S. Ruckman, the president of the Pensacola Bible Institute, first edition, 1962, second edition, 1969.

There is no showing in the record that these pamphlets were ever distributed to the congregation or to the leadership, but it is at least apparent to me that Dr. Janney utilized these publications in the preparation of his sermon or discussion that

was delivered following the filing of the current lawsuit. I mention that simply to say that Dr. Janney apparently had them available to him, but there is no showing that there was any distribution of them to the membership.

One of the deponents said, "Well, we had some pamphlets of some kind that were available, but I never knew of any distribution of any such fundamental religious belief." Dr. Janney, himself, answered the question for the Court, in a sense, when, after the filing of the lawsuit, he stated as follows to his congregation, speaking of the lawsuit, "Our position on this matter then is that there are Biblical reasons for having separate facilities," which he, and I expect most members of his congregation, accept. "There are practical reasons. It doesn't work. There are social reasons. It leads to interracial marriage and I think that intermarriage is a very bad circumstance. It is unscriptural." Dr. Janney announced the position that would be taken in the matter. They formulated a philosophy, a policy, which they feel can be supported, can be reconciled with the Scriptures, but their philosophy still remains a philosophy as distinguished from that type of fundamental religious belief which is protected by the free exercise clause.

Just as a further fact, going to the evolution of this policy and philosophy, Dr. Janney, in his address given after the lawsuit was filed, referred to his participation in the activities of a youth camp. I don't know whether it was the church's youth camp or not. In making one of the several points he made, he talked about an underprivileged camp that he was participating in in some capacity. There were about 500 blacks and three whites at the camp and he stated that was the ratio of the underprivileged in that particular area. Now apparently, at that time at least, socialization was acceptable, albeit there were three whites and five hundred blacks, the reverse ratio as would have been in attendance at the school. We recognize that the

philosophy of the school is based in part upon the fact that the children would likely be in the school for twelve years together and the camp is just a temporary thing and intermarriage, through socialization, though it might occur, was not as likely to occur in a short period as over a period of commingling for twelve years.

The only reason I mention that is that this is further evidence of the clear picture that this belief is a sincere belief and philosophy, but were it a fundamental religious belief and tenet, then it was not practiced at that camp. I mention that only as bearing upon the distinction between a philosophy and a fundamental religious practice.

The Yoder case talked about the sincerity of Henry Thoreau and his activities at Walden were based upon his philosophy subjectively formed. This leadership in this school has a philosophy and a policy which it believes in, subjectively arrived at as a result of the subjective evaluations of the social scene and political scene, but the admittance of these children would not endanger the free exercise of religion. As stated by one of the persons, it is a very minor consideration.

Therefore, all of the evidence in this case dictates the opinion and the ruling that the defense, based on the free exercise of religion clause, cannot be upheld because the position taken, which has evolved, does not rise to one of the fundamental religious tenets of the school or the church.

Dr. Janney closed his remarks with an observation that he believed that twenty years from now the school would be in the same position that it is now with reference to this question, and I don't doubt that he is right because this point of law has a long way to go to be ultimately decided in the Supreme Court of the United States and the decision is one that we cannot

anticipate. This Court has followed the law and is absolutely satisfied from this record that its factual determination is correct.

DONE and ORDERED at Miami, Southern District of Florida, the 28th day of May, 1975.

/s/ Joe Eaton

United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NUMBER 73-1313-Civ-JE

JOHNNY BROWN, JR., etc., et al.,
Plaintiffs,

vs.

DADE CHRISTIAN SCHOOLS, INC., etc., et al.,
Defendants.

(Filed June 27, 1975)

FINAL JUDGMENT AND INJUNCTION

THIS CAUSE came on for trial before the Court without a jury on the issue of damages, liability having heretofore been determined by the Court. The issues in this cause having been duly heard and a decision having been duly rendered, it is

ORDERED and ADJUDGED that:

1. Plaintiff, Marice Brown, shall recover from Defendant, Dade Christian Schools, Inc., the sum of $2,000.00 with lawful interest of 6% beginning the date of this judgment.

2. Plaintiff, Johnny Brown, Jr., shall recover from Defendant, Dade Christian Schools, Inc., the sum of $1,500.00 with lawful interest of 6% beginning the date of this judgment.

3. Plaintiff, Valerie Michelle Brown, shall recover from Defendant, Dade Christian Schools, Inc., the sum of $1,000.00 with lawful interest of 6% beginning the date of this judgment.

4. Plaintiff, Jacqueline Marie Brown, shall recover from Defendant, Dade Christian Schools, Inc., the sum of $1,000.00 with lawful interest of 6% beginning the date of this judgment.

5. Plaintiffs shall recover from Defendant, Dade Christian Schools, Inc., reasonable costs of this action.

It is further

ORDERED and ADJUDGED that Plaintiffs take nothing from the individually named defendants, and the Plaintiffs claim for damages is dismissed as to the individually named defendants.

It is further

ORDERED and ADJUDGED that Defendants, Dade Christian Schools, Inc., Arthur E. Kreft, and A. C. Janney, their agents, servants, employees and all persons acting in privity with them are permanently enjoined and restrained from barring Valerie Michelle Brown and Jacqueline Marie Brown from enrolling in the Dade Christian Schools, Inc., because of their race. Plaintiffs' prayer for injunctive relief is dismissed as to Defendants John M. Kalapp and V. S. Ackerman.

DONE and ORDERED at Miami, Southern District of Florida this 27 day of June, 1975.

/s/ Joe Eaton
United States District Judge

cc: Ellis S. Rubin, Esq.
Shutts & Bowen

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NUMBER 73-1313-Civ-JE

JOHNNY BROWN, JR., etc., et al.,
Plaintiffs,

vs.

DADE CHRISTIAN SCHOOLS, INC., etc., et al.,
Defendants.

(Filed June 27, 1975)

SUPPLEMENTAL FINDINGS AND CONCLUSIONS

On May 28th, 1975, this Court orally announced findings of fact and conclusions of law on the liability phase of this case. Thereafter a conference was held prior to consideration of the damages issue. Counsel for the plaintiffs announced at the conference that Plaintiffs' prayer for punitive damages and for an award of attorneys fees were withdrawn. The parties agreed to submit written memoranda on the issue of compensatory damages and to await the Court's judgment on that issue.

Upon consideration of the record and the memoranda filed, the Court enters the following findings of fact and conclusions of law.

1. The refusal of the Defendant, Dade Christian Schools, Inc., a Florida non-profit corporation, to accept the minor plaintiffs as students solely because the minor plaintiffs are black,

proximately caused each of the named plaintiffs to be damaged.

2. Each of the named Plaintiffs have suffered embarrassment, humiliation and mental anguish as a proximate result of such conduct.

3. An award of compensatory damages for such embarrassment, humiliation and mental anguish is hereby made as follows:

A. In favor of Marice Brown, and against Dade Christian Schools, Inc.,[1] the sum of $2,000.00.

B. In favor of Johnny Brown, Jr., and against Dade Christian Schools, Inc.,[1] the sum of $1,500.00.

C. In favor of Valerie Michelle Brown and against Dade Christian Schools, Inc.,[1] the sum of $1,000.00.

D. In favor of Jacqueline Marie Brown, and against Dade Christian Schools, Inc.,[1] the sum of $1,000.00.

4. There is no basis in the record for finding the individually named defendants liable for the payment of compensatory damages to plaintiffs.

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[1] In the pretrial stipulation filed February 19, 1974, the parties agreed in paragraph IX, page 6, that the issue of law to be determined in the cause was "Are Plaintiffs entitled to relief . . . by reason of the refusal of defendant Dade Christian Schools, Inc., to accept the minor plaintiffs as students solely because of their membership in the black race?"

5. Plaintiffs are entitled to a permanent injunction restraining the defendants, Dade Christian Schools, Inc., Arthur E. Kreft, and A. C. Janney, their agents, servants, employees and all persons acting in privity with them from barring Valerie Michelle Brown and Jacqueline Marie Brown from enrollment in the Dade Christian Schools, Inc., because they are black.

DONE and ORDERED at Miami, Southern District of Florida, this 27th day of June, 1975.

/s/ Joe Eaton
United States District Judge

cc: Ellis S. Rubin, Esq.
Shutts & Bowen

Appendix B–1

Johnny BROWN, Jr., etc., et al.,
Plaintiffs-Appellees-Cross Appellants,

vs.

DADE CHRISTIAN SCHOOLS, INC.,
etc., et al., Defendants-Appellants-Cross Appellees.

CASE NUMBER 75–3260

United States Court of Appeals,
Fifth Circuit.

July 25, 1977

Before BROWN, Chief Judge, GEWIN, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, MORGAN, CLARK, RONEY, GEE, TJOFLAT, and HILL, Circuit Judges.

JAMES C. HILL, Circuit Judge:

Appellant-defendant Dade Christian Schools, Inc. (Dade Christian) appeals from the judgment of the District Court for the Southern District of Florida awarding damages to plaintiffs and enjoining defendant school from barring Valerie and Jacquelin Brown from enrolling in the school because of their race.

The plaintiffs in this case, Mr. and Mrs. Johnny Brown, Jr. and their two children, named above, are members of the black race. The defendant, Dade Christian, is a sectarian school, located on the property of and receiving subsidies from the New Testament Baptist Church. Its students are not limited to those in families of church members and it advertises in the "yellow pages" section of the telephone directory.

On July 25, 1973, Mrs. Brown with her children applied to Dade Christian for enrollment of her children. Upon arrival, Mrs. Brown was handed a printed card reading:

"DADE CHRISTIAN SCHOOLS
6601 N. W. 167th Street
Hialeah, Florida 33015

We are sorry . . . But the policy
of the school is one of non-integration
and we would request that you respect this policy.

School Administration"

Mrs. Brown and her children left the premises, allegedly embarrassed and humiliated, and this suit followed.

It is stipulated that race was the sole reason for the refusal of appellant to enroll the Brown children.

A nonjury trial was conducted and evidence taken consisting of depositions and documents. The first issue was whether or not 42 U.S.C.A. § 1981[1] applied to discrimination by a private school. If it were found that 42 U.S.C.A. § 1981 did apply the court was confronted with the question as to whether or not the conduct of the defendant constituted the exercise of religious belief protected by the Free Exercise of

[1]42 U.S.C.A. § 1981 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Religion Clause.[2] The defendant asserted that its members sincerely held a religious belief that socialization of the races would lead to racial intermarriage, and that this belief, sanctioned by the Free Exercise Clause, should prevail against private interests created by Congress.

The trial judge held that Section 1981 reached and forbade private discriminatory conduct of the school. The trial court then conducted a full trial and, based upon evidence received, found as a fact that defendant's discriminatory policy was based upon a social policy or philosophy and was not a part of the exercise of religion. Therefore, any question of balancing interests embodied in § 1981 with those expressed in the Free Exercise Clause was not reached.

Judgment was entered for the plaintiffs. Dade Christian appeals, contending that Section 1981 does not reach private discrimination and, further that the findings of fact by the District Court were clearly erroneous.

When this appeal came to us, the Supreme Court had before it for decision the issue of the applicability of Section 1981 to private schools. We ordered that this case be heard *en banc* rather than by a panel of this Court.

On June 25, 1976, the Supreme Court in the case of *Runyon v. McCrary*, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415, held that 42 U.S.C.A. § 1981, like 42 U.S.C.A. § 1982, reaches private conduct and prohibits private, commercially operated, non-sectarian schools from denying admission to prospective students because they are black. Therefore, while

[2]U.S. Const. Amend. I provides in part:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .

this issue was raised in the appeal it is no longer an issue for us to decide. Judge Eaton's decision on it preceded the *Runyon* case. He resolved it correctly. *Runyon v. McCrary, supra.*

The Supreme Court noted that the *Runyon* case did not call for the resolution of any potential tension between litigants seeking to enforce Congressionally created civil rights and those relying on the Free Exercise of Religion Clause of the First Amendment of the Constitution.[3]

Although the defendant would have us resolve this issue left open in *Runyon,* we are, also, not called upon to balance these potentially conflicting interests. The trial judge, after careful consideration of all the evidence, concluded that the defendant's policy of segregation was not the exercise of religion. Our review of the evidence convinces us that the findings of the trial judge were supported by substantial evidence. The printed card handed to Mrs. Brown at the school expressly stated the racial exclusion to be based on policy. The application for admission to the school contains a list of nine tenets entitled "[w]e believe." While these tenets may constitute religious beliefs, none of them includes anything relating to segregation of schools. Indeed, they do not refer to commingling or separation of the races at all.

We do not hold that a belief must be permanently recorded in written form to be religious in nature. However, the absence of references to school segregation in written literature stating the church's beliefs, distributed to members of the church and

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[3]"It is worth noting at the outset some of the questions that these cases do not present.

. . . They do not even present the application of § 1981 to private sectarian schools that practice racial exclusion on religious grounds." 427 U.S. at 167, 96 S.Ct. at 2592.

the public by leaders of the church and administrators of the school, is strong evidence that school segregation is not the exercise of religion.

Five days prior to the filing of this suit, the minutes of the church disclosed the following:

> Dr. Janney explained to the congregation the decisions that had been made by the church in previous years in regard to integration. He also explained that he would follow the previous dictates of the church in this area *unless instructed otherwise by the membership.* (emphasis added).

We agree with the trial judge that the indication that the contested belief would be subject to change upon the direction of the congregation comports with the social or political nature of the exclusionary policy.[4]

The principal of the school, Mr. Kreft, was asked for the basis for forbidding commingling of whites and blacks. He answered, "Just by general references. Now, I don't know of a specific position, other than policy directives."

Mr. Kalapp, an incorporating officer, of defendant school, when asked how the policy of exclusion was adopted, responded as follows: "I don't think it was adopted at a specific

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[4]As pointed out in the dissenting opinion of Judge Roney, the trial court could have found this the exercise of religion by a congregationally organized church wherein every believer is his own priest. This is to say, the finder of fact in this case might have, from the evidence, found the facts to be different from the resolution actually reached. But he did not, and it was his duty to weigh the evidence. Ours is to determine whether or not there was sufficient evidence upon which to base the finding. F.R.Civ.P. Rule 52, 28 U.S.C.A.

time as I recall it. I think it was something that evolved as a philosophy and a policy over a period of a number of meetings."

Mr. Kreft further stated that "[b]asically it would be more or less the Board of Directors of the School who would direct me regarding the policy of enrollment."

Mr. Ackerman, held the position of secretary-treasurer for the first five years of the school's existence, 1961–66. He stated that, at the time he left the school, he was not aware of any policy concerning the enrollment of blacks and the reason for this was because "[t]he issues in the first five years were not very strong issues in those days, because even in our public schools, the integration was just very token, and just beginning at that time."

To the same effect is the statement of Mr. Kalapp that the policy "came into being on a very gradual basis, because in the very early days of the school there was no such conversation in regard to integration." Later, in his words, the leaders "decided that a school philosophy needed to be adopted in view of the fact that it had gotten to be such a topic of conversation, . . . because of all the furor in the newspapers and other news media that was being brought about by such things as busing and forced integration in schools."

From the above, and other evidence, the trial judge concluded that, if belief in school segregation was religious in nature, neither the officers of the school nor the congregation of the church were aware of it. He found that as social conditions changed and the issue arose, a policy was formulated by the school leaders. While a religious belief may be of recent vintage or formed instantaneously, the trial judge's conclusion that school segregation was nothing more than a recent policy developed in response to the growing issue of segregation and

integration was amply supported by the evidence.

Though difficult, it is clearly the duty of the court to decide, as a matter of fact, whether or not any activity constitutes the exercise of religion. *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed2d 15 (1971); *Theriault v. Carlson*, 495 F.2d 390 (5th Cir. 1974); *Founding Church of Scientology v. United States*, 133 U.S.App.D.C. 229, 409 F.2d 1146 (1969); *United States v. Kuch*, 288 F.Supp. 439 (D.C.D.C.1968).

Judge Goldberg's special concurrence misses the mark in two ways. First, he assumes that the institutional actors, i.e., the school and the church, do not have independent rights of free exercise of religion which they can assert. The existence or non-existence of institutional rights of free exercise is a perplexing legal question which we need not decide here. Second, and more important, cases such as *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), and *Gillette v. U.S.*, 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971) do not apply to the case at bar. *Gillette* and *Yoder* dealt with the actions of individuals; in *Gillette* a willful failure to report for induction into the armed forces, and in *Yoder* violation of the cumpulsory school attendance law. Therefore, it was appropriate to scrutinize the individual religious beliefs of the parties in those cases. Here, however, the refusal by Dade Christian School to admit a black child was an institutional action taken by an institution whose patrons are, according to the evidence, divided in their beliefs on the religious justification for racial segregation. In such a situation the only practical course open to a Court is to examine the corporate beliefs of the institution involved, as adopted or promulgated or carried forward as an institutional concept. To do otherwise would allow the institution to pick and choose which of its members' potentially conflicting beliefs it wished to assert at any given time. Thus, an avowedly secular school should not be permitted to

interpose a free exercise defense to a § 1981 action merely because it can find some of its patrons who have a sincere religiously based belief in racial segregation. Conversely, a school or church which holds racial segregation as a religious tenet should not be barred from asserting a free exercise defense to a § 1981 claim merely because some of its patrons or members might individually believe racial segregation is morally wrong.

Our opinion today is not to be taken as requiring or suggesting that religious beliefs be institutionalized in order to be eligible for First Amendment protection. Indeed, they need not be. Yet, congregational churches recognizing no dogma other than the priesthood of the individual do institutionalize many activities sponsored or supported by them. Scout troups, hospitals, colleges and universities are but a few. When the lawfulness of an activity of any such institution is in question, the focus of the inquiry must be upon the basis for the institution's activity. Whether it be the troop's policy for the award of merit badges, the hospital's requirements for staff privileges, or the college's admission principles, the basis is that particular institution's basis. Whether or not it is the exercise of religion or simply a policy of the institution not presenting constitutional issues is a question of fact. We affirm the district court's finding on that question. Judge Goldberg and Judge Roney call attention to some evidence upon which a contrary finding might be made, but its focus is more upon individuals than upon the school, itself, and it is only the admission policy of the school under scrutiny.

It is for this reason that the district judge sought to determine whether or not the sincerely held beliefs of some of the members of the church had been institutionalized as a religious exercise by the school. He found that this private school wished

to deny admission to blacks for the same reasons as Bobbe's Private School and Fairfax-Brewster School, Inc. had, and not as the exercise of religion. *Runyon* declares that this cannot be done.

Judge Goldberg refers to the whims of fact-finders. We do not characterize findings of fact in our judicial system as whimsical. No oracle has been identified to which difficult issues may be referred, and we find none. Therefore, we have addressed the issue presented in this case and we affirm the trial court's resolution.

AFFIRMED.

JOHN R. BROWN, Chief Judge, concurring:

I concur in that portion of part V of Judge Goldberg's opinion articulating the principles of balancing and the conclusion that governmental interest in desegregation of schools outweighs the First Amendment claim, if any, of the school, the church, or both.

GOLDBERG, Circuit Judge, specially concurring:

Today the plurality embraces the unacceptable principle that beliefs derived from the Bible by members of a Florida Baptist church do not constitute "religion" within the meaning of the first amendment. Its constructive definition of religion is an egregious departure from the fundamental precept of unswerving religious tolerance that underlies the Constitution's religion clauses. I must respectfully but emphatically record my disagreement with the plurality's approach. This record discloses views that are "religious."

While I agree with the dissenters that appellant raises a

free exercise claim that must be considered on its merits, I believe we cannot legitimately delay that consideration, and I therefore reject their suggestion of a remand. I concur in the plurality's result because I believe that appellant's free exercise claim is outweighed by the compelling governmental interest in securing the rights of blacks freely to contract with private schools, thus eradicating one of the badges of slavery against which this nation and this court are firmly committed.

In sum, the record is clear that the relevant beliefs are religious but equally clear that the religious practices are destructive of the undergirding principles of the thirteenth amendment. Appellant has not established a successful defense to appellees' § 1981 action. The plurality reaches a righteous result for errant reasons.

I write extensively because of two intense convictions. First, religious concepts, even when imperfectly expressed, should not be denigrated into non-religion. Second, the rights of blacks to participate in our society on equal terms must have ascendancy over a religious practice that can be subordinated without impairing the religion's viability.

I.

Much of the difficulty with the plurality's approach stems from its handling of the district court opinion. The plurality begins and ends its inquiry with the conclusion that there is substantial evidence to support the district court's characterization of the beliefs in question as merely "philosophical" rather than "religious."

I believe the plurality's reliance on the trial court is erroneous. First, the district court improperly framed the issues, and its analysis suffered accordingly. Second, there is in any event

no justification for the plurality's total deference to the trial court on this important issue.

A.

The first task in analyzing the free exercise defense is to determine whose "religion" is at stake. The problem arises because appellant is a corporation, Dade Christian Schools, Inc. (hereinafter Dade Christian). Properly analyzed, the issue is one of standing to assert the constitutional rights of others. Under the circumstances here Dade Christian undeniably has standing to assert the constitutional rights of its students and their parents.[1] Similarly, Dade Christian has standing to assert the rights of its teachers and of members of the New Testament Baptist Church. That church founded Dade Christian and establishes its policies, and Dade Christian conducts its classes on the church's property.

I would have thought that no member of this court would disagree with these conclusions with respect to standing. In

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[1]The Supreme Court so held in *Runyon v. McCrary*, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976):

> It is clear that the schools have standing to assert these arguments on behalf of their patrons. See *Pierce v. Society of Sisters*, 268 U.S. 510, 535–536.

Id., 427 U.S. at 175 n. 13, 96 S.Ct. at 2596. The Court's disposition of the issue in a single footnoted sentence is understandable; the proposition was too well settle for controversy. *Pierce* was but one of many cases the Court could have cited. *See generally* Note, Standing to Assert Constitutional Jus Tertii, 88 Harv.L.Rev. 423 (1974) (collecting cases; suggesting analysis fully consistent with finding standing here). *Cf. Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1977) (saloon propreetor can assert constitutional rights of patrons).

The rights asserted in *Runyon* were associational rights, whereas Dade Christian seeks to assert its patrons' religious rights. The difference, however, is irrelevant to the standing issue.

analyzing standing we must assume that these various third parties have a free exercise right to attend or maintain a segregated school. The question is whether, assuming there is such a right, Dade Christian can assert it. The answer is clear. If Dade Christian is denied standing to assert the free exercise rights of its students and the church's members, those rights will be forever lost. The injury this damages action will impose on the school will operate as a denial of those third parties' rights. The rights of students and church members will be of little value if the school itself must integrate.[2]

The problem, then, is to determine the relevant religious beliefs[3] of the students, their parents, the teachers or the church members. The district court, however, approached the issue in a much different fashion. Unguided by the parties, the court sought to determine the religious beliefs of the

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[2]The plurality's assertion that we should focus solely on the institution is no more appropriate here than in *Runyon v. McCrary*, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976). *See* note 1 *supra*. The *Runyon* court required no showing of whether the students and parents universally ascribed to the views espoused, and we should follow that lead. If some students disagree with the rights that the school espouses on behalf of others, the balance of substantive interests might be affected, but the right ever to litigate the interests should not be foreclosed. Moreover, this record demonstrates no disagreement at all. Some individuals may articulate the moorings of their beliefs in different ways, but so far as this record is concerned, not a single Dade Christian student, parent, teacher or administrator opposes racial segregation. An institution willing to conduct a segregated school, thus accommodating the individual religious beliefs of its patrons, should be allowed to assert their rights.

[3]No one has attempted to distinguish "practices" from beliefs," and I use the terms without attributing a significance to the distinction. Religious *beliefs* enjoy absolute constitutional protection; appellees presumably do not question New Testament Church members' right to entertain any beliefs they choose. What is at issue is the religious *practice* of maintaining racial segregation in certain activities.

institutions–the school and the church–rather than of the *people* behind the institutions. Framed in that manner, the issue is unduly difficult. The district court's response was destined to fail because of the improper framing of the issue. The court held that the *institution's* religious beliefs should be taken to be a subset of the religious beliefs of any given church member: the *institution's* beliefs were only those beliefs that could be characterized as "generally held, recognized, [and] fundamental." More fully, the district court said:

> We are here concerned with whether or not the leadership in the school, or the school itself, excluded [appellee children] because of a generally held religious conviction, a generally held tenet of religion. In other words, we are not talking about whether one individual out there operating the school may have had some particular fundamental religious belief, but whether there was a generally held, recognized, fundamental religious tenet of the school through its leadership.

Perhaps if we were truly concerned only with the religious views of a corporation itself, the district court's approach would have merit. But our concern is not so limited. We are concerned with the individual religious beliefs of school students and church members. To hold otherwise would be to deny the school's standing to assert the students' and church members' constitutional rights and to foreclose those rights from ever being aired.[4]

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[4]Contrary to the plurality's suggestion, I do not take the position here that an institution has no free exercise rights of its own. I agree with the plurality, although for different reasons, that "[t]he existence or nonexistence of institutional rights of free exercise is a perplexing legal question which we need not decide here." *Ante* (slip opin. at 4649) at ––. The individual rights are sufficient to take us to the merits, eliminating any necessity to rely on institutional views.

B.

Even had the district court framed the issue properly, the plurality's reliance on its views would be improper. Whether particular beliefs constitute "religion" is not simply a question of fact. The inquiry is a mixed question, a question of the application of law to facts. Our responsibility to exercise our own independent judgment on the issue is therefore much greater than the plurality acknowledges.

The plurality's departure from the proper review standard is particularly troublesome under the circumstances here. First, this is a first amendment case, and our jurisprudence has long recognized the freedom of appellate courts to reassess the facts in such cases.[5] Our precious first amendment liberties have never been entrusted solely to the shilm of some trier of facts. Indeed, the plurality opinion illustrates precisely how an ostensible "finding of fact" may mask a series of value-laden assumptions in this difficult area. When "findings of fact" carry such grave implications, review should never be cursory. All levels of the judicial force have an obligation to maintain an unrelenting vigil over first amendment freedoms.

Moreover, in this case there is no justification whatsoever for reliance on the district court's factfinding. The district court

[5] *See, e. g., Cox v Lousiana*, 379 U.S. 536, 545 & n. 8, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965). In *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) the Court reviewed the criminal convictions of parents who for religious reasons refused to send their children to public schools beyond the eighth grade. The Supreme Court made no effort to stay close to the findings of the trial court, nor did it invoke the familiar principle that after criminal convictions facts are reviewed in the light most favorable to the government. Instead, the Court's opinion contains numerous recitations of evidence apparently unsupported by findings of fact, and the Court freely cited sources not contained in the record at all. *See* 406 U.S. at 210 n.5, 216 n.7, 217 n.8, 223 n.12, 92 S.Ct. 1526.

heard not a single live witness. The parties submitted the case on the basis of depositions and exhibits only. We have available to us all the sources from which the district court drew its conclusions, and we see them in the same form as did the trial judge. The record consists of a single volume, assorted documents and a cassette recording; reaching our own conclusion with respect to whether these beliefs constitute "religion" does not impose a significant burden on appellate resources. To defer to the district court rather than undertake a de novo determination of this important issue is to abdicate our solemn responsibility to reject claims of constitutional right only after careful reflection. I believe we should ourselves assess the record to determine whether the beliefs in question are "religious."

II.

Before undertaking a review of the record, I deem it appropriate to say a word about the nature of the inquiry. Judge Roney, in his dissent, has amply demonstrated the plurality's departure from sound first amendment jurisprudence. The plurality focuses on a preliminary inquiry into whether beliefs comport with a niggardly definition of "religious." We should instead define "religion" broadly and redirect our attention to the merits of the free exercise claim. One person's heresy can be another's religion. It is extremely important that religion be defined in such a manner that labeling does not become the touchstone of constitutional analysis. We must be clear beyond the peradventure of anyone's speculation that what is religion is given its place as religion. Relying upon Judge Roney's marshaling of the authorities for these propositions, I add a brief word to emphasize my view of their importance and to set out my understanding of today's holding.

History records abundant instances of religious persecution. Although some have been directed at established religions,

probably most have impinged upon religious heretics who were, at least initially, without an organized following and without an institutionalized catalog of their beliefs. Religious heterodoxy often becomes orthodoxy, but the transformation need not be instantaneous. Well-charted dogmas and creeds are not necessary to a new or even to an old religion. The plurality's focus on the lack of such attributes raises the possiblity that first amendment protection would be withheld from those who need it most. Indeed, it is at least unclear whether the plurality would accord first amendment protection to a modern Martin Luther or Roger Williams. The framers of the Bill of Rights would undoubtedly be dismayed to learn the restricted scope today suggested for the religion clauses. I cannot emphasize too strongly how grievously I believe the plurality errs by unconsciously importing into its test for defining "religion" its own views about how a church should be organized, how it should express its views, and how an individual should manifest his or her religious beliefs.

It is important to note that a majority of this court today rejects these erroneous views. That majority is comprised of the seven judges whose views are expressed in Judge Roney's opinion or in this opinion. For the most part I agree with Judge Roney, though even he adopts a requirement that a belief must have "an institutional quality about it" in order to bring the religion clauses into play. Because in another part of his opinion Judge Roney makes clear his understanding–with which I fully concur–that discriminating among religions on the basis of their manner of deriving or expressing their views is unconstitutional, I believe Judge Roney's "institutional quality" should be given an extremely broad reading. At any rate, while I cannot at this juncture join his precise framing of that test, it is at least clear that today a majority of this court squarely rejects the plurality's narrow and unprecedented approach to defining "religion." Whatever the outer perimeters

of the concept of "religion," the beliefs at issue here do not exceed them.

This view is confirmed by *Gillette v. United States*, 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971). There the Court entertained a free exercise claim derived from a "personal decision" "based on a humanist approach to religion." *Id.* at 439, 91 S.Ct. at 831. There was no showing that Gillette's religion had any other adherents or exhibited any "institutional quality" other than its role in Gillette's life. The Court held that legitimate governmental interests justified drafting Gillette despite his religious opposition to the Vietnam War. The Court considered the free exercise claim on its merits rather than rejecting it as not "religious." *Id.* at 461 62, 91 S.Ct. 828. By doing so the Court conclusively demonstrated the error of the plurality's approach[6] and the necessity to read Judge Roney's institutional quality" remark broadly.[7]

Religions can have abhorrent principles; most religious practices are benign, benevolent and beneficent. But we should not judge a religion by its practices. One era's spiritual error is another's heralded religion.

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[6]The plurality attempts to deal with *Gillette* by arguing that *Gillette* concerned an individual's views while here we deal with an institution's views. But Dade Christian has standing to assert the rights of the individuals, just as the private schools in *Runyon v. McCrary*, 427 U.S. 160 n.13, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976) had standing to assert the rights of individuals.

[7]Note also the handling of the companion case, *Negre v. Larsen*, 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971). Negre, a devout Catholic, claimed religious objection to "unjust" wars. The Court made no effort to determine whether opposition to unjust wars ranked high among the tenets of Catholicism or, indeed, whether any other Catholics shared the view. The Court rejected the free exercise claim because it found overriding governmental interests.

No one would deny that the ten commandments are "religious," but religious principles need not be etched in stone or handed down from Sinai. A free exercise claimant can carry its evidentiary burden without producing in court a burning bush. While I attempt no cosmic definition of religion, it is clear that God and the mundane combine in the religion of the church under examination today. This church had a God-derived cosmos.

III.

Having set forth my disagreements with the plurality's propositions of law, I turn to analysis of the record. I believe the plurality's conclusion is wrong even on its own terms. The facts do not support the view that these beliefs were merely "policy" within the plurality's distinction between "policy" and "religion." The plurality seizes upon various instances when school officials–lay persons insensitive to the overtones of their choice of language–spoke loosely of the anti-integration "policy." I believe a more balanced analysis of the record as a whole would indicate that the witnesses also repeatedly referred to the "religious" moorings of the beliefs.

Dr. Arthur E. Kreft, the school's principal, testified at his deposition that enrolling blacks in the Dade Christian school would endanger the practice of his religion. (R. 198). He said the enrollment of blacks would alienate him from God "in the sense that I would be disobedient, according to my beliefs in the Scriptures." (R. 220). Enrollment of blacks would erode Kreft's "religious liberties." (R. 219). Appellees stipulated that they had no basis to impeach these statements by Kreft (R. 378), and I can conclude only that Kreft's beliefs are sufficiently "religious" to invoke free exercise scrutiny. I believe it incontrovertible that appellant has standing to assert the free exercise rights of its principal, Dr. Kreft. Moreover,

Kreft himself was a defendant, and the district court enjoined Kreft from denying appellee students admission to Dade Christian. Kreft can certainly assert his own free exercise rights. Kreft's testimony conclusively demonstrated the necessity to address the free exercise claim on its merits.[8]

Similar testimony came from John M. Kalapp, Dade Christian's original vice president, who left the school early in 1973. Kalapp believes that enrollment of blacks at Dade Christian would endanger his "religious beliefs" "[i]f it culminated in an intermarriage situation between the races" (R. 241), which he apparently believes it would. Kalapp derives these views from his "overall concept and understanding of the teaching of the entire Scriptures." (R. 250–51). Appellees stipulated that they had no basis to impeach these statements. (R. 378).

Also in evidence is a recording of remarks that Dr. Janney made to the New Testament Baptist Church congregation. Dr. Janney is the church pastor and president of Dade Christian Schools, Inc. The tape makes undeniably clear that Dr. Janney entertains religious beliefs that integrating Dade Christian would be wrong. Although he delivered the remarks after this suit was filed and in contemplation of litigation, no one questions their sincerity. The remarks were the message of a pastor to his congregation. Dr. Janney's views, derived from detailed analysis of numerous Biblical passages, could hardly be characterized as anything other than "religious," even under the plurality's

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[8] If only Kreft's religious practices were involved, the constitutional balance might be struck differently than if widespread views were involved. I do not, however, understand the plurality to believe that the individual interests of Kreft or others are insufficient to outweigh the opposing governmental interests in enforcing § 1981. Rather, the plurality refuses to place these individual views on the scales at all.

stringent approach. Dade Christian has standing to assert the free exercise rights of its president and founding church's pastor, and Dr. Janney's views alone should therefore take this court to the merits of the free exercise defense.[9]

In addition, Dade Christian has standing to assert the free exercise rights of students, parents, teachers, and church members. Although none of these persons testified, the record is replete with statements indicating that many of them entertain religious beliefs opposing integration. This is shown in the many statements by Dade Christian witnesses concerning what "we" believe.

Dr. Kreft testified that, based on Biblical interpretation, "we" are teaching that there should be no interracial socialization. (R. 212). Kalapp testified that by allowing black to enroll at Dade Christian, "We in effect would be teaching our young people that we sanctioned the socialization and the end result of intermarriage, and as a result of that we would be teaching them by example things that were contrary to our religious beliefs." (R. 245). Kalapp continued that accepting blacks at the school would put "us" "in an unfavorable light as far as being obedient to what He [God] would have us do." (R. 251).[10] These unchallenged statements undeniably establish that the views are "religious."

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[9]Again, Janney's individual views might conceivably provide less support for the free exercise defense than would more widespread views. But the individual views at least require the court to go beyond the stumbling block of defining "religion." *See* note 8 (slip opin. p. 4655, p.––, *supra*.

[10]The use of the first person plural to explain these views was perhaps unfortunate; it is not completely clear to whom the pronouns "we" and "us" refer. I believe the statements express the views of the teachers, the church members, the parents, or perhaps combination of these.

Surely a practice which is based on Biblical interpretation (R. 212) and the contravention of which would constitute disobedience to God (R. 251) is a "religious" practice.[11] Indeed, I would have thought this conclusion too clear to give rise to differences of opinion.[12] Had the church members read the Bible and sought to obey God in a more conventional fashion, their views would have passed unquestioned as "religious." Yet the only distinction between such clearly "religious" views and those now before the court would lie in their familiarity to the majority of our citizens and to the judges of this court. If such a distinction determined one's ability even to cross the threshold to have one's free exercise claims heard on their merits, first amendment jurisprudence would indeed be at a low ebb.

It should be clear by now that I believe Dade Christian is entitled to rely on the religious views of the various related persons irrespective of how Dade Christian as an institution came to embrace the practice of racial segregation. Whether Dade Christian adopted its rule in response to passing fancy or fundamental religious belief, the rights of church members and

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[11]The plurality concludes otherwise, relying on Dade Christian's printed card listing nine items which "we believe." As the plurality notes, the card does not mention racial segregation. The first belief listed, however, is that the Bible is the infallible word of God. If the "we believe" card is to be read with the exacting scrutiny we accord to legal documents, we should treat the segregative beliefs derived from the Bible as incorporated by reference.

[12]If citations are necessary, we could begin with *Wisconsin v. Yoder*, 406 U.S. 205, 216, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). In characterizing the beliefs there as religious, the Court relied on their derivation from the Bible.

school students may be asserted as a defense to this § 1981 action.[13] The plurality disagrees, emphasizing the manner in which the no-blacks rule evolved.

Once again, I believe the plurality is wrong on the facts as well as the law. The Dade Christian leadership adopted the rule in response to religious tenets, not transient policy dictates. Knowing that it would one day face the issue, Dade Christian's board of directors undertook a discussion of "what would be the right thing scripturally to do." (R. 238). The directors reached a decision based on "the overall concept of the teachings of the Scriptures, and such things as God's dealing with the nation of Israel, the Tower of Babel, [and] the confusion of tongues in the Book of Acts." (R. 239). The board of directors concluded that "it was God's will that the races were made separate for a purpose." (R. 239). Appellants stipulated that they had no basis to impeach these statements. (R. 378). The plurality characterizes that decision, based on "God's will" as divined from the Bible, as not sufficiently "religious" even to warrant threshold consideration of the free exercise defense. I cannot agree.

IV.

There is of course more to analyzing a free exercise claim

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[13] *See* section IA *supra*. In *Runyon v. McCrary*, 427 U.S. 160, 175 n.13, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976) the court recognized the standing of private schools to assert their patrons' rights. The ruling extended to the 395 schools that were members of an association that was a party defendant. Many of those schools undoubtedly adopted their racially exclusive policies for reasons having nothing to do with the constitutional rights that they sought to assert on behalf of their patrons. Some may have been motivated by the prospect of financial gain, others by racial bigotry, and others by mere convenience. Yet the Supreme Court, in a single footnoted sentence, granted them all standing to assert their patrons' rights.

than determining whether the belief in question is "religious." We must decide whether sufficient governmental interests justify interfering with the claimant's religious practices. In his dissent, Judge Roney concludes that we should delay passing on this matter, remanding instead for the district court's initial consideration. I respectfully disagree.

First, although I agree with Judge Roney that this record is no marvel, I do not believe we should remand for the taking of further evidence. This was a private lawsuit seeking individual relief. The parties tried it as they saw fit. Both sides submitted all their evidence. Defendants had every incentive to develop fully the nature of their beliefs concerning segregation and the place of those beliefs in the practice of their religion. Plaintiffs had every reason to challenge those presentations. The issues have remained unchanged throughout this litigation. In such circumstances there is no justification for remanding this case to allow either party to attempt to buttress its case. However imperfectly, this case has been tried.

Second, the district court's failure to consider the issue does not call for a remand. This litigation has now been pending for nearly four years. As victors below, appellees were of course free to urge on this appeal every ground supporting their judgment, and the balancing issue is properly before us. Appellees are undoubtedly eager to bring this action to a close and to receive whatever damages are ultimately awarded; they can hardly be expected to complain of an early decision. Appellant, too, has written this court noting the community pressures it bears as a result of the pending litigation and clearly indicating its desire for an expeditious resolution of the matter. Whatever the value to this court of the district court's views, they are of far less significance than the parties' interest in a final decision. We certainly have a sufficient factual basis for resolving all issues; Judge Roney does not point to any specific factual

questions that are left unanswered by this record and that are necessary to our decision. I am unable to agree to a remand.

V.

I now turn to the difficult issues that I believe are unavoidable. The Supreme Court has adopted various formulations in its efforts to reconcile governmental interests with those of free exercise claimants. In *Sherbert v. Verner*, 374 U.S. 398, 403, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) the Court said that a religious practice could be infringed only on the basis of a "compelling state interest."[14] In *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15 (1972) the Court announced that free exercise claims could be overbalanced only by "those interests of the highest importance and those not otherwise served." Whatever the precise standard, free exercise analysis requires a careful comparison of the interests on both sides of the issue.

Charting the interests of free exercise claimants requires dispassionate dedication to the principle that courts cannot question the veracity of sincerely held religious beliefs. I therefore proceed on the assumption that desegregating Dade Christian would force the principal and at least some of the teachers, students and parents to be disobedient to God. (R. 220, 251). Rejecting the free exercise claim would impinge upon the religious practice of maintaining racial separation in activities that constitute "socialization."

That religious practice was characterized by Mr. Kalapp as a "very minor" part of the religion. (R. 251). Departure from

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[14]The Court quoted the phrase from *NAACP v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963).

the practice, although constituting disobedience to God, would not endanger salvation. While these factors do not sap the free exercise defense of vitality, they make clear that overriding that defense will not endanger the church's survival.

Nor can appellant's claim garner appreciable support from the fundamental interests of parents and students in guiding the quality and nature of the education. Allowing blacks into Dade Christian will not affect the substance of the education; the school remains free to teach any doctrine it chooses, including the merit and religious requirement of racial segregation. Dade Christian's argument that admission of blacks would itself convey an undesirable message and thereby affect educational content carries little weight. Although the school leadership's voluntary enrollment of blacks might communicate such a message, desegregation in response to a federal court's implementation of the congressional mandate of § 1981 would not. Much as merchants were freed by the Civil Rights Act of 1964 from any fear that white customers would react adversely to the acceptance of black business, parents and school leaders are freed by § 1981 from any fear that children will interpret acceptance of blacks as an indication of church approval of the practice. The parents' right to direct the upbringing and education of their children remains intact.

Dade Christian is also unable to elicit any support from right of association principles. Here, as in *Runyon v. McCrary*, 427 U.S. 160, 175–179, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976) (rejecting association defense to § 1981 action against private school), the school simply does not operate in a manner implicating associational interests. Dade Christian advertises for students in the yellow pages and concededly exercises no policy of exclusion other than its ban on blacks. (R. 372). Dade Christian therefore can claim no constitutionally cognizable interest in the sanctity of its school community. This

case on its facts simply does not implicate the interests of a church in maintaining the intimacy of its activities.[15]

The sole basis of Dade Christian's claim is therefore the "very minor" religious practice of preserving racial segregation in activities that constitute "socialization." If such activities extended to eating in restaurants, shopping in stores, or watching the Miami Dolphins, I suppose no one would contend the religious scruples would justify segregation of the activities. The government's interest in enforcing its policy of racial equality in such areas is clearly sufficient to override any free exercise defense.[16]

Dade Christian does not, however, advance religious opposition to integration of these public activities. Rather, its grievance extends only to interracial "socialization," which it defines to include children's school attendance but to exclude the above activities with respect to which the challenge would undoubtedly fail. Dade Christian's criterion for distinguishing prescribed "socialization" from other types of interracial contact is apparently the likelihood that interracial marriage will be encouraged. (R. 180–81, 199, 218, 239, 241, 245, 247). This adherents of the New Testament Baptist Church do not seek to overturn the Civil Rights Act of 1964 or to separate themselves from our integrated society; they merely seek to avoid situations that might lead to interracial marriage.

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[15] Thus, while I am sensitive to the concerns expressed by Judge Coleman in his dissent, I do not believe they affect the decision here.

[16] In such cases the governmental interest in racial equality would be augmented by the interests of other customers who oppose segregation. The case at bar does not involve such interests; there is no evidence that any Dade Christian students or parents oppose segregation.

In this respect it is important to note that no one purports to use § 1981 as a basis for imposing interracial marriages upon anyone. Dade Christian students, like everyone else, remain free to marry whom they choose. Dade Christian parents remain free to teach their children that interracial marriage violates religious commands. That some students may depart their parents' commands and that integrating the school might make it infinitesimally easier for them then to effectuate their disobedience are hardly prospects lending weight to Dade Christian's position. The Constitution has never guaranteed parents an opportunity simultaneously to exist in an urban environment and to exclude every possibility that children will hear and adopt ideas at odds with those of the parents.

I do not mean to suggest that the religious beliefs at issue extend only to interracial marriage. Dade Christian advances a sincere belief that integrated education violates divine command. But that belief occupies a minor position in its adherents' religion and is based largely on the prospect that no government proposes to require.

In sum, Dade Christian's interests, while not minimal, do not rise to the level that has characterized numerous free exercise claims. I find that the government's interests, in comparison, are compelling.

Most free exercise cases have involved governmental interests manifested in legislative judgments. *See, e. g., Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (governmental interest in public education beyond eighth grade held insufficient); *Gillette v. United States*, 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971) (governmental interest in war-time draft held sufficient); *Braunfeld v. Brown*, 366 U. S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961) (governmental interest in assuring one day each week of peace and quiet

held sufficient). While these are legitimate legislative goals exhibiting varying levels of importance, none respond to *constitutional* obligations. The government is not constitutionally obligated to require public education, to draft soldiers, or to maintain a day of rest.

Here, in contrast, the government's interests draw strength not only from the congressional judgment manifested in § 1981 but also from the Constitution itself. The thirteenth amendment proscribes slavery and involuntary servitude. In ensuring blacks an equal opportunity to enter contracts, § 1981 seeks to eradicate some of the badges and incidents of slavery. A more compelling governmental interest has perhaps never been enlisted in opposition to a free exercise claim.

Dade Christian, however, seeks to minimize this interest by assigning it a narrow role in this case. Dade Christian would characterize the government's interest as that in the admission of two blacks to the Dade Christian school, rather than as that in eradicating the badges of slavery through universal enforcement of § 1981. This issue of the appropriate scope of the governmental interest recurs in free exercise decisions and poses important and subtle difficulties.

I believe that among the most important factors in this respect are the institutional consequences of the alternative decisions. When a court can recognize a free exercise claim without inviting numerous additional claims, focusing on the particular consequences of the ruling in the case at bar is appropriate. But when recognizing the claim will predictably give rise to further claims, many of which will undoubtedly be fraudulent or exaggerated, the situation is different. In that event the court must either recognize many such claims (so that the relevant governmental interest extends beyond the individual claimants in the original action) or draw fine and search-

ing distinctions among various free exercise claimants. The latter course would raise serious constitutional questions with respect to the proper functioning of courts in sensitive religion clause adjudication. Courts are of course competent to sort sincere from insincere religious contentions, but the process of doing so, and of striking different balances when confronted with sincere claims posing subtle variations in religious dogma, inevitably embroils courts undesirably in religious controversies. When numerous claims are likely, recognizing some while rejecting others unavoidably forces courts to pick and choose among religions and to draw subtle distinctions on the basis of criteria with which no governmental unit should ever become intangled. Although the establishment clause values contravened by such a course of adjudication could not justify refusing to consider a free exercise defense, *see Wisconsin v. Yoder*, 406 U.S. 205, 234 n. 22, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), courts ought not to invite the prospect unnecessarily.[17]

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[17] Indeed, no Supreme Court decision recognizing a free exercise defense has involved a claim likely to induce numerous, often fraudulent attempts by others to invoke the protection of the decision. *See Wisconsin v. Yoder, supra* (claim of exemption from mandatory education beyond eighth grade unlikely to spawn additional claims); *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) (claim of entitlement to unemployment compensation after firing for refusal to work on Saturday unlikely to induce significant number of fraudulent claims).

When confronted with claims other than those arising under the religion clauses, courts appropriately attribute much less significance to the likelihood of future litigation. Religion clause cases are different because of the constitutional values that extensive litigation contravenes. Thus, for example, my analysis is consistent with the short shrift that equal protection courts frequently accord to arguments based on administrative convenience or the prospect of burdensome litigation. *See, e. g., Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L. Ed.2d 225 (1971).

The claim that Dade Christian advances is not one that we could recognize without inviting numerous additional claims. Opposition to integration does not die easily. Those who turned to white academies in response to public school integration will undoubtedly seek ways to avoid *Runyon v. McCrary's* mandate to integrate the private schools. We therefore cannot view Dade Christian's claim in isolation. We have three alternatives: recognizing Dade Christian's claim but rejecting a significant number of future claims, recognizing Dade Christian's claim and most others as well, and rejecting Dade Christian's claim.

The first alternative would commit us to case-by-case effort to distinguish meritorious from meritless future claims. In that way we could minimize the impairment of § 1981's goals, but we would thrust ourselves into the troublesome course of adjudication that I have described as contrary to more fundamental religion clause values. I believe we should reject this opportunity to set ourselves up as a board of religious arbiters.

The remaining alternatives are to steel ourselves to recognize virtually all of the free exercise claims that a decision for Dade Christian would foster, or to reject Dade Christian's claim. We must choose either to recognize the free exercise defense in this and numerous cases, thus undermining to a large extent the vitality of § 1981 in this area, or to override the defense and enforce § 1981's constitutionally-based mandate.

The appropriate result is clear. The constitutional imperative to eliminate the badges of slavery has not dimmed in the 114 years since President Lincoln issued the Emancipation Proclamation. The compelling governmental interest in moving nearer that noble goal overrides appellant's interest in preserving a "very minor" religious practice. No less restrictive alternative is available; the government cannot afford appellees

their right to be free of racial discrimination in contracting without infringing appellant's opposition to such contracts. Although free exercise claims deserve the most careful consideration and the greatest deference, they cannot always prevail. When the government interest is so strong and the impact upon the religion so slight, the religious practice must yield. I concur in the judgment of affirmance.

RONEY, Circuit Judge, with whom GEWIN, COLEMAN, AINSWORTH, CLARK and TJOFLAT, Circuit Judges, join, dissenting:

Because the belief of the New Testament Baptist Church in separation of the races is sufficiently religious to establish a First Amendment claim, I respectfully dissent.

I.

Whether a belief is "religious" and thus deserving of some protection by the First Amendment does not depend on whether the belief is true or false. *United States v. Ballard*, 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148 (1944). Nor does it depend on whether the belief is reprehensible to the majority of society. Instead, as the very cases cited by the plurality demonstrate, the "religious" nature of a belief depends on (1) whether the belief is based on a theory "of man's nature or his place in the Universe," *Founding Church of Scientology v. United States*, 133 U.S.App.D.C. 229, 409 F.2d 1146, 1160, *cert. denied*, 396 U.S. 963, 90 S.Ct. 434, 24 L.Ed2d 427 (1969), (2) which is not merely a personal preference but has an institutional quality about it, *Wisconsin v. Yoder*, 406 U.S. 205, 216, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), and (3) which is sincere. *Theriault v. Carlson*, 495 F.2d 390, 394 (5th Cir.), *cert. denied*, 419 U.S. 1003, 95 S.Ct. 323, 42 L.Ed.2d 279 (1974); *United*

States v. Kuch, 288 F.Supp. 439, 443 (D.D.C.1968) (alternate holding); *see Ballard*, 322 U.S. at 81–82, 64 S.Ct. 882.

The belief of the New Testament Baptist Church in separation of the races meets all these requirements. First, the church bases its belief on a system of theology derived from the Bible. The church infers a duty to segregate from the story of the Tower of Babel, the confusion of tongues in the Gospel of Acts, and certain statements of St. Paul. For church members, racial intermarriage is a sin, though not a mortal one.

The plurality seeks to discredit the theological basis of the belief in segregation by noting it was adopted by a congregational ballot. The 1963 vote to exclude blacks from membership, the plurality observes, does not reflect religious belief because it could be repealed. Following that logic, no church which has a congregational, or even representative, form of government could be said to have any beliefs protected by the First Amendment, because church members either directly or through elected representatives, control the content of church creeds. Such a holding is untenable. It discriminates among religions inviolation of the Establishment Clause, and ignores the doctrine that questions of church government are beyond the scope of judicial review. *See Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 96 S.Ct. 2372, 49 L.Ed.2d 151 (1976).

Second, the belief is not a mere personal preference but has found institutional expression, both in church teachings and in the operation of the school. The congregation voted to exclude blacks. At least one sermon delivered by Dr. Janney, the church's founder, has articulated the Biblical theory of segregation. The school lost its federal tax exempt status because it refused to sign a statement of nondiscrimination. The school edits teaching materials to exclude pictures of "multi-

ethnic" groups. The school promulgated the policy card given the plaintiff.

The plurality seeks, in effect, to discount this institutional expression. The failure of written church documents to refer to segregation is said to show segregation is not a tenet of the church. However, a religious practice does not have to be written to enjoy First Amendment protection. *State v. Yoder*, 49 Wis.2d 430, 182 N.W.2d 539, 541 (1971), *aff'd*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). Furthermore, the failure of examined documents to mention segregation may simply mean that segregation was such a well accepted belief of the membership that the church leaders felt the congregation did not need any rules to guide its conduct in that respect. The 1963 church vote was unanimous. Finally, limiting protection to written beliefs discriminates unfairly against sects which are small or new, and so have not developed the elaborate theology of more traditional religious groupings. The impact of such discrimination on the defendant church's ability to prove its case is clear. It was forced to rely solely on documents generated by its less than 4,000 members during the short 22-year history of the church. The trial court rejected writings by authors who were not church members, on the grounds that no one other than Dr. Janney was proved to have read them.

The third question to be considered is whether the belief in segregation is sincere. The trial court said in this regard "[t]here is no doubt that it is a sincerely held belief and the Court recognizes the sincerity . . ." Though the trial judge and the plurality impeach that sincerity by noting the recent vintage of the church statements concerning segregation, the record does not show any attempt to

> [adopt] religious nomenclature and cynically [use] it as a shield to protect them when participating in antisocial conduct that otherwise stands condemned.

Kuch, 288 F.Supp. at 443. Furthermore, timing alone should not discredit the sincerity of a religious belief. While the founding, or even expansion, of a school to accommodate white students seeking to evade a court order increasing the degree of desegregation in the public schools may well call sincerity into question, this record shows no evidence of such conduct. Absent such a manipulative purpose, application of established doctrine to changing social or technological circumstances should be protected, because it lies at the heart of a living faith.

A direct nexus exists between the New Testament Baptist Church belief in separation of the races and the desire to segregate the church school. The school and church are intimately associated. Church leaders founded the school in reaction to the court decision removing prayer from the public schools. *See, e. g., Engel v. Vitale*, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962). The pastor is the president of the school. All teachers belong to the church. The church and the school use the same building. The only room the church does not use on Sunday is the principal's office. The policy of segregation in the school springs from a belief that the Bible commands separation of the races and school segregation is necessary to deter intermarriage. The connection directly parallels the interest of the Amish parents in *Yoder*, who kept their children out of public high schools to avoid "worldly influences" which would interfere with a child's integration into the Amish faith community. 406 U.S. at 218, 92 S.Ct. 1526. Consequently, the impact of § 1981 on free exercise cannot be dismissed as "indirect." *See Braunfeld v. Brown*, 366 U.S. 599, 606, 81 S.Ct. 1144, 6 L.Ed. 2d 563 (1961). The command of § 1981 is that commercially operated private schools must admit students without regard to race. *Runyon v. McCrary*, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976). That imperative directly impinges on the free exercise rights of the New Testament Baptist Church.

II.

The conclusion that the congressional mandate of § 1981 affects the church's free exercise of religion, however, does not end the matter for the Court. The established law requires a balance of one interest against another in a head-to-head conflict. *Wisconsin v. Yoder, supra; McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896, 93 S.Ct. 132, 34 L.Ed.2d 153 (1972).

I decline to consider that balance in this dissent. The plurality opinion does not address it. The district court did not consider the question and made insufficient findings to aid our analysis. The constitutional base for the statute is well established. *Runyon*, 427 U.S. at 165-171, n. 8, 168, 96 S.Ct. 2586. The constitutional right to free exercise of religion is emphatic. The record is silent, however, on a number of questions important to the balancing of these conflicting constitutional claims.

The judgment of the district court should be reversed, and the case remanded for further proceedings to resolve all issues relevant to the federal interest in applying § 1981 to infringe the free exercise rights of this church.

COLEMAN, Circuit Judge, dissenting:

I join in the dissent filed by Judge Roney. I agree with the reasoning demonstrated in that opinion, but perhaps my views run more deeply than those there exhibited.

I do not understand that the church is operating this school as a commercial enterprise. It is a direct, intimate adjunct of church activities, conducted in the house of worship. From the earliest days, when governments were doing absolutely

nothing about it, nearly all religious denominations have conducted schools, including colleges, as an integral part of their activities. If the church is to remain absolutely separate and apart from the state, then no court should have the power to compel any church to admit any student to any school operated for religious reasons.

This case may turn out to be the first step of a long, intrusive interference with the exercise of religion. I hope this does not prove to be so.